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No. 910-913

ABRAHAM L. SHUSHAN,

versus

UNITED STATES OF AMERICA

Petition of Abraham L. Shushan for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof.

HUGH M. WILKINSON,
JOHN D. LAMBERT,
Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

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Petition of Abraham L. Shushan for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Abraham L. Shushan, a citizen of the United States, domiciled in the State of Louisiana, respectfully brings this, his application for a writ of certiorari, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW

Petitioner was convicted on December 22nd, 1939, in the District Court of the United States for the Eastern District of Louisiana of violating the Mail Fraud Statute (section 215, Criminal Code; 18 U.S.C.A., 338).

He was found guilty on eight mailing counts (out of nine charged in the indictment). The verdict was similar as to all five defendants, including petitioner. Likewise was the sentence (imposed January 2nd, 1940), the same as to all defendants, petitioner being condemned to serve, on the various counts, concurrent sentences of imprisonment in the penitentiary of thirty (30) months and to pay a fine of $2,000.00. Petitioner thereupon took his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming the conviction of all five defendants, including petitioner, on January 18th, 1941 (see opinion, Tr. Vol. VIII, page 4801; 117 Fed. (2d) 110). Petitioner, within the delays allowed by law, and on February 8th, 1941, filed his petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit (see Tr. Vol. VIII, page 4855), which petition for rehearing was denied on March 3rd, 1941 (Tr. Vol. VIII, page 4860). That on March 7th, 1941, a stay of mandate was ordered by the United States Circuit Court of Appeals for the Fifth Circuit for a period of thirty (30) days, exclusive of Sundays and holidays, from March 3rd, 1941, to enable petitioner to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. Vol. VIII, page 4862).

STATUTE INVOLVED

The statute under which defendant was convicted (section 215, Criminal Code; Title 18, U.S.C.A. 338) reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,

> * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the Post Office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisonment not more than five years, or both." (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130).

JURISDICTION

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended (section 347, Title 28, U.S.C.A.), making it competent for this Court to review by certiorari any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED

On July 10th, 1936, the investment banking house at New Orleans of Newman, Harris & Company, com-

posed of the defendant Newman and the defendant Harris, made a contract with the Board of Commissioners of the Orleans Levee District, an agency of the State of Louisiana. The contract was that Newman, Harris & Company should reorganize the bonded indebtedness of the board, by such refunding sales as were found advisable, so as to level off and reduce the total bonded obligation of the board, if possible, for which services Newman, Harris & Company were to receive a wholly contingent fee of twenty-five (25) per cent of the savings effected, and were to assume all expenses of the undertaking and additionally post a forfeit of one per cent of the principal amount of all bonds called for redemption against any failure of the sale of the refunding bonds. In order to avoid the element of a preference to themselves over other bidders by reason of their own employment and contingent compensation, and thus invalidate the bidding, Newman, Harris & Company put a clause in their contract preventing their banking house from bidding on any issues of refunding bonds of the Orleans Levee Board offered for sale under this arrangement. This idea of a service in such an advisory capacity, on a contingent fee basis, with the necessary legal detail of exclusion from bidding, had originated with the defendant Miller, a prominent New Orleans accountant, who had previously sought defendant Shushan's financial backing, and Shushan had decided such service should preferably be performed by an experienced banking-house, such as Newman, Harris & Company. The latter expressed a willingness to go forward with the plan if Shushan would back his judgment by underwriting half any possible loss in the venture, for a consideration of one-half of any possible gain. Shushan agreed, and assigned one-third of his possible profits, or one-sixth of the whole, to defendant Miller for his idea, Miller to

stand no responsibility for any possible loss. Under this arrangement, in which Shushan and Miller remained as silent partners, Newman, Harris & Company carried out certain refunding operations in 1936 and 1937. At the time these operations were undertaken, it was impossible to foresee what the results might be, or what savings, if any, might be effected. The fair percentage of contingent fee was estimated, as far as it was possible to make such an estimate under the circumstances, at twenty-five per cent. By skillful handling of the plan, and unexpectedly favorable market conditions in municipal bonds during the period of operations, Newman, Harris & Company reduced the bonded obligation of the board within 15 months by approximately $2,000,000.00. On this savings thus effected, Newman, Harris & Company collected their contingent fee of twenty-five (25) per cent, and after deducting costs and expenses of approximately $100,000.00, the net fee was divided one-half to Newman, Harris & Company, one-third to Shushan, and one-sixth to Miller. Services under the contract terminated about October, 1937, when final payment on the Newman-Harris fee was made. The levee commissioners were well satisfied with the results, and the board's president testified at the trial in 1939 that he still thought the levee district had been greatly benefitted by the Newman-Harris plan. There was no criticism of the refunding operations from their close in October, 1937, until August, 1939, when a political campaign for the governorship was going on in Louisiana. Through a federal grand jury hearing in that month, Shushan learned for the first time that defendants Miller and Waguespack had filed, in March, 1938, federal income tax returns showing defendant Miller had given part of his proceeds of the contract to defendant Waguespack, who was Miller's own lawyer, but also a member of the levee board

at the time. The government also criticized two other things: first, that Newman, Harris & Company, long after the contract was made, but during its performance, had paid money to a minor employee of the board named Fitere for services which Newman and Harris thought were to the mutual advantage of the board and themselves in helping assure successful refundings of the board's bonds; and, secondly, that Newman, Harris & Company, in the custom of the municipal bond trade, had computed their contingent percentage fee against the present total of savings effected, whereas the government contended allowance should have been made, by some discount method, for savings of interest in future years, or, in other words, by applying a "future worth" theory which defendants showed was never practiced in the municipal bond trade. Chiefly on these three items of: (1) defendant Miller's division of profits with defendant board member Waguespack; (2) Newman, Harris & Company's employment of levee board clerk Fitere; and (3) the calculation of the savings effected to the board by the straight arithmetical method, rather than on the "future worth" theory, the five defendants were indicted and prosecuted because of certain mailings in connection with the refunding operations. The procuring of the indictment and the preparing of the case for trial, particularly against Shushan, who was politically prominent, was to the continuous accompaniment for four months of a barrage of antagonistic newspaper propaganda. This was in connection with an approaching bitter State election. Mr. Rogge, an assistant attorney-general sent to Louisiana contemporaneously with the political campaign, openly allied himself with the politicians opposed to the faction with which Shushan had previously been prominently identified. The New Orleans newspapers were also opposed to that faction

and Rogge joined with them in attacking Shushan, furnishing these newspapers with information, even out of the federal grand jury room. Rogge and these newspapers joined efforts in seeking, for weeks before trial, to discredit Shushan in the public mind, which would make it impossible for him to obtain a fair trial. Rogge purposely set the indictment down for trial in the month of December, 1939, in the feverish closing days of the political strife which was to culminate with the election of January 16th, 1939. Excluding the Christmas holidays, the trial ended two weeks before election day, the purpose being to bring about Shushan's conviction as a symbol of the corrupt character of the political faction the newspapers were opposing, and thus influence the result of the election in the final days of the campaign. Shushan and his co-defendants tried to get relief from this intolerable situation by two methods: as early as a month before trial they petitioned the district judge to restrain the daily prejudicial attacks of the local press by contempt action, and they made early and timely application that the trial be postponed beyond the date of the election. Neither relief was given, and the case went to trial under such horrible conditions that over 100 citizens made affidavits that the defendants could not expect to get a fair trial. A few blocks from the courthouse a political headquarters had displayed to public view for weeks a huge caricature of Shushan in a convict suit with words issuing from his mouth: "I tried to bribe the jury". A so-called convict parade had been given night after night at mass meetings, including the figure of a man in convict stripes labelled "Shushan". In the opening days of the trial the newspapers assailed Shushan so unfairly (merely a continuation of what they had done for four months before the trial) that the district judge had the publishers and reporters of two news-

papers cited for contempt and tried, convicted and punished them, although refusing defendants' applications for a mistrial on account of said publicity. Shushan contends that under these conditions of the prosecuting officer's conduct and the trial judge's failure to either grant protection or postpone the trial until after the election, he was not given due process of law, and his conviction was a foregone conclusion, despite the fact that neither the indictment nor the evidence presented a mail fraud case under the law.

QUESTIONS PRESENTED

The case, from the viewpoint of petitioner Shushan, presents two primary questions, either of which should warrant the issuance of a writ to review the proceedings below:

1. Neither under the terms of the indictment, nor the showing made by the evidence, was there any defrauding or obtaining of money or property by any scheme devised or intended to be devised by defendant Shushan, directly or through any other person. The demurrer to the indictment should have been sustained. In the alternative, the motion for a directed verdict of not guilty should have been sustained. As to the method of computing the fee for services rendered by Newman, Harris & Company, which was the only claimed element of fraudulent **obtaining** in the case, the Circuit Court of Appeals below said: "Yet we should hesitate to rest a criminal conviction of fraud on it alone." Then that court proceeded, by affirming the conviction, to do that very thing, since as a legal claim of fraudulent obtaining of money or property there was and is no other legal grounds of criminal action in the whole case.

2. Irrespective of the question of the sufficiency or

insufficiency of the indictment to make out a mail fraud case, or, in the alternative, the sufficiency or insufficiency of the evidence to support a mail fraud case, it is the contention of petitioner Shushan that by reason of the improper conduct of the Assistant Attorney-general in charge of the prosecution in co-operating with the newspapers to create prejudice against Shushan for political purposes, and then trying Shushan's case on the eve of a bitterly contested election and as a part of the campaign propaganda, this petitioner was not given due process of law in his trial.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied on for the allowance of a writ of certiorari are:

1. That the constitutional and statutory rights of the petitioner Shushan have been infringed by conviction for using, or causing to be used, the mails, in furtherance of a scheme to defraud and for obtaining money or property by false pretenses, representations, or promises, where the petitioner Shushan, neither directly or through any other person, did not devise or intend to devise any scheme to defraud or for obtaining any money or property by false pretenses, representations or promises; but, on the contrary, the petitioner Shushan had engaged in a legal and proper undertaking, through honest, reputable and responsible people in the trade, which resulted to the advantage and benefit of the levee district, and had not been intended as, or caused a fraud upon, said levee district.

2. That the element in the case, unknown at the time to petitioner Shushan (as shown by all the evidence), of defendant Miller dividing part of his fee with defendant board member Waguespack, which in its worst

aspect could be only a violation of the State bribery law, has been shrewdly used by the prosecution to manufacture a color of fraud as to the performance of the contract itself; that since the contract was admittedly performed, and the fee paid was entirely contingent upon gain to the levee district, the prosecution has pitched its claim of fraudulent obtaining upon a contended wrong manner of computation of fee, whereas said claim of the prosecution is fanciful, arbitrary, and inconsistent with the contract itself and the custom of the municipal bond trade, and was merely used (in conjunction with the possible violation of the State bribery law) to create a false inference of a fraudulent obtaining of money.

3. That the constitutional and statutory rights of the petitioner Shushan have been further infringed by a conviction under the conditions and circumstances described in the annexed brief, where he was denied due process of law by the special prosecutor and the trial judge, and his trial was held under conditions approaching the famous propaganda trials of Soviet Russia.

TRANSCRIPT ANNEXED

The record having been printed for the use of the court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioner has filed herewith the copies of said record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF

Petitioner also files herewith and makes part of this application his brief in support thereof.

PRAYER

WHEREFORE, petitioner A. L. Shushan respectfully prays that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced below, and discharging him forthwith; and petitioner prays for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

HUGH M. WILKINSON,

JOHN D. LAMBERT,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

This petition of A. L. Shushan for a writ of certiorari presents a case of where a circuit court of appeals has so far sanctioned the departure of a court trial from the accepted and usual course of judicial proceedings, as to call for the exercise of this Honorable Court's power of supervision. We contend that the application of the Mail Fraud Statute to the relations (in 1936 and 1937) between Newman, Harris & Company and the Orleans Levee Board was, legally, a distortion of the meaning and purposes of that statute. We say, and will endeavor to point out, that the Circuit Court of Appeals for the Fifth Circuit has recognized this in principle in its opinion, but has mistakenly failed to give it effect in the court's judgment.

The test of the whole matter is that Newman, Harris & Company, a reputable investment banking house at New Orleans, made a contract to do certain things for the Orleans Levee Board at their own risk and expense, their compensation to be wholly contingent upon their reducing the bonded indebtedness of the board, and to be a percentage of such savings, if any, thus effected. There is no question in the case that the work was done, and a savings to the board was effected.

It afterwards developed that there was in the case the element of an alleged "bribery" of one defendant by another defendant. All parties testified, and the record is otherwise persuasive, that neither Newman, Harris, or present petitioner Shushan were aware of the payment claimed to have been "bribery".

But whether they were or not, as a legal proposition

the "bribery" of board member Waguespack was remote from the claimed fraudulent obtaining alleged to have violated the sanctity of the mails. This was an obtaining only of payment for an admittedly performed work.

Assuming that board member Waguespack was "bribed" in connection with the awarding of the contract, there had intervened, before any payment was made, the faithful performance of the work.

To try to circumvent this dis-connection of the "bribery" from the "payment", by the intervening element of faithful performance of the task, the prosecution fabricated a contention that the collection of the compensation had been an obtaining under the mail fraud statute by false pretenses, representations and promises, because Newman, Harris & Company had not discounted interest savings then actually arranged by Newman, Harris & Company, but which arrangement served to retire interest obligations which otherwise would have been payable by the levee district in future years. As against the straight arithmetical calculation of the existing difference in amount between one bonded indebtedness and another, commonly used in the municipal bond business, the prosecution conjured up a vague idea of discounting the earnings of future years, absent any such agreement between the parties, or any recognized custom of the trade to do so, or even any known discount rate which could be resorted to as a means of determining current value of such previously existing future obligations.

This necessarily became the main reliance of the prosecution to assemble all the essential ingredients of a mail fraud case. The "bribery" of Waguespack alone, even if it had been the moving force in the getting of the contract, could not have been the basis of a mail

fraud charge. It would be merely a State crime. *Fasulo v. U. S.*, 272 U. S. 620; *U. S. v. Smith*, 29 Fed. (2d) 926.

So the prosecution trumped up this contention of a fraudulent obtaining of payment, by non-use of the discount method. By this fanciful addition, they dressed up a state "bribery" into mail fraud, just as government attorneys had tried unsuccessfully to dress up the State crimes of extortion and embezzlement into mail fraud in the *Fasulo* and *Smith* cases, above cited, respectively.

Defense counsel did their best to get the judges of the district and appellate courts to see that this "discount theory" element the prosecution had purposely created out of thin air had been a shrewd subterfuge, to get around the doctrine of the *Fasulo* and *Smith* cases that the perpetration of a crime against the laws of a State, such as bribery, in addition to the established examples of extortion and embezzlement, does not of itself create a mail fraud case, even where use of the mails may bear some relation.

If the money or property obtained is a *quid pro quo* for services rendered, we say the fact that even bribery may have been resorted to, **in order to procure the opportunity to fairly do** the work, does not make the obtaining of the compensation for the work done in any sense fraudulent within the meaning of the mail fraud statute.

We had every reason to believe that the appellate judges would realize that the "discount theory" created by the prosecution had no place whatever in a criminal case, and that in holding it had no place in a criminal case, they would discard it, and would then see that, as in the *Fasulo* and *Smith* cases, the federal district attorney was pitching his case entirely on the alleged commission of a State crime. The court of appeals did discard the "discount theory", to the extent that after a full

review of the case they said at the close of their opinion that they "should hesitate to rest a criminal conviction for fraud on it alone" (Tr. Vol. VIII, page 4822). Then, having read the "discount theory" out of the case, in effect, as a basis for a charge of criminal fraud, they went on to say that taking it in connection with the "bribery" of Waguespack, they thought it was a jury question whether mail fraud was committed.

We respectfully submit, on the contrary, that whether, with or without the discarded "discount theory", the State crime of bribery could create a federal mail fraud offense where the money was paid for work performed, was and is a question of law, and should have been decided as a question of law, and in petitioner's favor, under his demurrer, and under his motion for a directed verdict, by the court of appeals; and the responsibility for determining what could or what could not constitute mail fraud within such narrow bounds of determination should not be left to legally unschooled jurors, who are apt to decide anything which for any reason looks wrong to them is mail fraud on general principles.

If the "bribery" of Waguespack, like the "embezzlement" of the sewing-machine agent in the *Smith* case, or the "extortion" by *Fasulo* in the case this Court recently dismissed, could not make a case of mail fraud, and the "discount theory" of wrongful obtaining was unacceptable, then the two negative precedents could not unite to make an affirmative consequent. If the compensation obtained by Newman, Harris & Company without "discount" was fraudulent *per se*, it would not need the "bribery" of Waguespack to make it a fraud. If it was not fraudulent of itself, and the Court of Appeals has so found, or it would not have "hesitated" to affirm the conviction therefor, then the disconnected and unre-

lated "bribery" of Waguespack could not make it an obtaining by fraud.

Error throughout the case, from the day the trial judge overruled the demurrer, to the date of the appellate court's opinion, has persisted through this abortive merging of the alleged bribery of Waguespack to procure opportunity to do certain work and the fantastic claim of a non-discount collection for the work. Whether either element, or both, could create mail fraud was and is a question of law which the trial judge and the appellate court should not have left to the jury, and the action of the Court of Appeals for the Fifth Circuit in doing so, inconsistently with the *Smith* and *Fasulo* cases, cited, should be reviewed.

In justice to our client, Shushan, we would briefly add that what we have already said assumes, for argument's sake, some connection on his part with the elements of the case discussed. As a matter of fact, however, **all** the testimony in the case shows that he had nothing to do with and actually no knowledge of either the payment made by Miller to Waguespack or the method of the computation of the levee board fee by Newman, Harris & Company. It is unfortunate enough that the government's legal theory on which conviction was obtained, as we have tried in these pages to show, was not a sufficient mail fraud cause; it is more unfortunate for Shushan that he was convicted in spite of the fact that he had no complicity in the two elements of the matter erroneously established by the government as its basis of a mail fraud action. Why this conviction of Shushan was nevertheless accomplished before a jury of twelve citizens presumed to ordinarily be fair and just to an accused, will appear from the following pages of this brief.

As we have said, Shushan had nothing to do with, nor even knowledge of, the payment by defendant Miller to defendant Waguespack. The circumstances of that payment, alleged by the government to have been "bribery", will be best explained in the petition and brief for a certiorari by those defendants. Likewise, the conduct of their refunding operations and the method of the computation of the fee therefor in accordance with the custom of the municipal bond trade, with none of which Shushan had the slightest to do, will be best described in the petition and brief for a certiorari by the defendants Newman and Harris. Without repetition, and unnecessary prolongation of this argument, we adopt by reference such further contentions of error as are advanced in the petitions and briefs to be filed by the four co-defendants.

POINT NO. 2: WANT OF DUE PROCESS

As your Honors may have already surmised, in a case, which on its most favorable aspect to the prosecution was so near the border line of debatable criminal fraud, there must have been some motive to impel its unusually hurried and vigorous prosecution, beyond the ordinary diligence of a district attorney's office. Where other motives than the impartial administration of criminal justice enter into such proceedings, it becomes but a short step to lack of due process. Where a showing of lack of due process is reasonably suggested by the application for certiorari, the writ should be granted and the validity of the conviction carefully scrutinized.

We have already said in our preceding petition that, due to the conduct of the special prosecutor sent down to Louisiana from Washington, D. C., Shushan's trial was held under conditions approaching the famous propa-

ganda trials of Soviet Russia. The court of appeals has agreed with us far enough to say in its opinion:

"We think that the prosecuting attorney's encouragement of the newspaper publicity about the case was ill-judged, and improper." (Tr. Vol. VIII, page 4808).

We differ with the opinion of the court of appeals only on the legal effect of this improper conduct of Mr. Rogge. The court of appeals affirmed the conviction despite Mr. Rogge's tactics; we say those tactics deprived petitioner Shushan of due process in his trial and, in fact, were solely and directly responsible for a conviction of what was a doubtful case at the best, a conviction which could not have been fairly obtained under ordinary conditions.

To correctly understand the effect of the special prosecutor's conduct on the outcome of this trial, it is necessary to take a bird's-eye view of the chronology of the events involved.

A. L. Shushan was president of the Board of Commissioners of the Orleans Levee District (commonly known as Orleans Levee Board) from 1928 to 1935.

This was a board composed of seven members, serving without pay, five (including Shushan) appointed by the governor, the others being ex officio the Mayor and the Public Property Commissioner of the City of New Orleans.

Shushan's incumbency was during the political regime of Huey P. Long in Louisiana. He was known as a very prominent Long adherent, and he was liked or disliked accordingly as the individual's political bias was for or against Huey Long.

The faction's leader was assassinated in September,

1935. The following month the government conducted a bitter trial of Shushan for alleged income tax evasion. The jury acquitted Shushan, to the disappointment of political opponents, chief among whom were the New Orleans newspapers.

Following his acquittal, Shushan resigned, on October 26th, 1935, from the Orleans Levee Board. He was friendly with the succeeding governor, Richard W. Leche (1936-1939) but held no office under him.

Between July, 1936, and October, 1937, during the first two years of the Leche administration, and when Shushan was no longer connected with the Orleans Levee Board, occurred the series of bond refunding transactions by that board through the banking investment house of Newman, Harris & Company. These transactions are what the prosecution interprets as "mail fraud" in this case, but which the defendants say was an honest and able reorganization of the board's financial structure which immediately improved its position by $2,000,000.00.

These bond refundings were completed by the end of 1937, and for more than a year and a half there was no criticism of them.

In the early summer of 1939 President James M. Smith of Louisiana State University fled from financial shortages and other scandals to Canada, and shortly afterwards Governor Leche resigned. Lieutenant-governor Earl K. Long, younger brother of the deceased Huey Long, succeeded Leche as governor, and almost immediately launched a campaign to be nominated to succeed himself in the Democratic primary to be held January 16th, 1940.

Foes of the Long faction rallied to vigorously oppose Earl Long, and part of their strategy was to send to

Washington for a powerful political ally in the person of a representative of the United States Department of Justice. To this task was assigned Assistant Attorney-General O. John Rogge, heading a large corps of assistants and investigators, who entered Louisiana about June of 1939 to a great fanfare of political newspaper publicity.

Under color of prosecuting "federal offenses", Rogge and his aides openly allied themselves with the local political leaders on one side of the Louisiana primary fight, and proceeded to use all of the tremendous resources of his high federal position to collect and furnish to the anti-Long newspapers material for a deluge of campaign publicity. He used the federal grand jury room as a sounding-board for the daily blasts of the local press. As he recently told a Chicago luncheon club, he wrote his "mail-fraud" indictments so as to always include a few paragraphs for the benefit of the advance publicity on the trial. He took advantage of the unlimited amount of news print available to him to propagandize the guilt of his defendants first, and then put them before a jury panel already saturated with the prejudice of such propaganda.

Among the political victims of this system who were early selected for "purging" was the defendant Shushan. His participation with Newman, Harris & Company in the underwriting of the levee board's bond refunding transactions was known to Rogge, because as far back as March, 1938, over a year before, Shushan had returned to the federal government for tax on his earnings in the venture.

Rogge also knew what we proved Shushan then did not know, that Waguespack, a member of the board, had received from another defendant (Miller), a portion of

Miller's earnings in the Newman, Harris & Company work for the board, because in March, 1938, Waguespack and Miller had reported tax accordingly to the government.

With this claimed "bribery" of Board Member Waguespack, only a State offense, to work from, Rogge and his allies, the New Orleans newspapers, set out deliberately to "get" Shushan.

On the morning of July 22nd, 1939, before anything had been announced regarding an investigation of the Newman-Harris contract, the New Orleans Times-Picayune printed a cartoon of a buzzard marked "financial advice", an obvious reference to that contract. Rogge said afterwards the matter had been under investigation a month. Who tipped the cartoonist off can be readily surmised.

From that time on, the allied Rogge-newspaper assault on Shushan was continuous and unrelenting, even until after his trial began.

There was not a trick known to journalism to which these newspapers did not resort in bringing about, first the indictment, and afterwards the conviction, of Shushan. The deadly weapon of ridicule was used in the daily cartoons, often identifying him by name, and always striking at the things which the public were educated otherwise to connect him with. He was assailed in editorial after editorial, directly or indirectly. He was attacked by the publication of letters from partisan patrons of these newspapers. Shrewd appeals to prejudice were made frequently printing large photographs of what was constantly termed his "mansion on the Gold Coast of St. Tammany Parish"; and by giving sensational publicity to orders of the Levee Board to remove his

name from the local airport; and to vicious and unfounded innuendoes that his previous acquittal of the income tax charge in 1935 **had been accomplished through his bribery of the jury.**

It was in this last mentioned phase of the newspaper campaign that the Assistant Attorney General in charge of the case cooperated mostly effectively. This attack on the previous Shushan jury was made in the month of August, 1939, and was no doubt calculated to have a double effect. Mr. Rogge's first mail fraud case, the Bienville Hotel case, was to be tried in September, and the Shushan case was to be tried in December. By having it generally known that the federal grand jury at New Orleans was engaged in an investigation of so-called jury tampering in the 1935 case, prospective 1939 jurors would be discouraged from any leadings toward the defense in the mail fraud cases about to be tried, lest **they** hereafter might be suspected of and investigated for having succumbed to some improper influence. In other words, since no citizen relishes the idea of having government policemen and federal grand juries probing his conduct or habits, plenty of publicity about this kind of an investigation **ahead of the 1939 mail fraud trials** was bound to make future jurors cautious about taking any stand for a defendant under existing pressure against such defendants. Secondly, such publicity would build up a background of thought in the public mind that Shushan had cheated justice once before, rather than been fairly acquitted, and would make it more difficult for him to obtain acquittal a second time.

But it was only out of the federal grand jury room that such an attack could originate with safety. Neither Mr. Rogge nor the newspapers had, or ever have had, any proof that anybody on the Shushan jury of 1935 was bribed in connection with the verdict in that case. For

the newspapers to initiate such a baseless accusation would not only have sounded hollow, but it might have exposed them to the libel laws. Ordinarily, if such a matter was investigated in a grand jury room, the ban of secrecy would have been enforced to protect any person unjustly accused or investigated, since grand jury proceedings are privileged, and redress is impossible where any harm is caused an individual, by circulation of such reports.

But the rights of an individual against undeserved reflection upon his character or acts, and the ban of secrecy on grand jury proceedings, meant nothing to the New Orleans newspapers in the Shushan case. The fact that the federal grand jury was investigating what was termed "jury tampering" in the previous Shushan case was freely announced from day to day in the columns in these New Orleans newspapers, which credited Mr. Rogge with divulging to them such information. In this manner the suspicion was indelibly stamped on the public mind that Shushan had escaped justice in 1935 by corrupting his jurors, and when nothing conclusive to this effect ever emerged from the grand jury room, by way of indictment, the newspapers just quietly dropped the subject, and there was nothing Shushan could do to counteract the rumor thus so effectively set in circulation in the district wherein he had to stand trial.

This "jury tampering" story was only one device resorted to by the newspapers for the purpose of discrediting Shushan. To reprint, or even discuss, everything prejudicial which was hurled at him for five long months, would make this brief more lengthy than the transcript already is.

In support of our contention that Shushan did not receive due process of law, in the practical meaning of

that legal term, we review to your Honors the following high-lights of the publicity campaign against him, every one of which will be borne out by the record and the physical exhibits filed in the case.

(a) The publicity campaign by the New Orleans newspapers to get Shushan indicted and convicted began on July 22, 1939, a month before his indictment, and over four months before his trial.

(b) It was no temporary sortie, but on the contrary was pressed relentlessly for 154 days without any let-up until the verdict of guilty was in.

(c) Its chief motive was to make Shushan, and the Levee Board bond refunding operation, symbolic of public corruption, and link them with the current political campaign to help swing the election of January 16, 1940.

(d) As part of the general political campaign, a special prosecutor, Mr. O. John Rogge, was brought to Louisiana, only for the duration of this political campaign, to handle the Shushan case, among various politically-connected matters.

(e) Special Prosecutor Rogge, certain political candidates and their managers, and the four New Orleans newspapers, all worked in close cooperation on publicity helpful to the newspapers' faction in the political campaign, including publicity relating to Shushan growing out of this case.

(f) The New Orleans newspapers were allowed to quote Special Prosecutor Rogge as to what was going on in the federal grand jury room in relation to Shushan, and thus with safety circulate unfounded and slanderous insinuations that Shushan had previously escaped conviction in an income tax case by "tampering" with the jury which had acquitted him.

(g) Special Prosecutor Rogge melodramatically posed prior to Shushan's trial for a photograph published by the newspapers showing him holding "symbolic bullets" sent him in a "threatening note", with mention over the picture of a warning "to drop his investigation of the Abe Shushan jury tampering case".

(h) In addition to such quoting of special Prosecutor Rogge, and his posing for such a photograph, all made use of as prejudicial publicity by the New Orleans newspapers against Shushan, for nearly five months those newspapers laid down a daily barrage of cartoons, editorials, pictures, letters from the public, and news articles calculated to inflame the public against Shushan and his case.

(i) This newspaper barrage was co-ordinated with political campaign speeches by numerous candidates and their orators, which became nightly programs on the stump and radio during December, the last month of the campaign and the month of the trial, and in which Shushan was continually held out to the public as guilty of the offense charged in the indictment.

(j) A so-called "convict parade" of a group of men in striped prison clothes, one of whom wore a sign marked "Shushan", was paraded around mass meetings all over the State by one of the candidates for the governorship, and this campaign stunt was publicized until it became a household word against Shushan throughout Louisiana.

(k) In a campaign headquarters of the same candidate for governor in New Orleans, not over four city blocks from the courtroom where Shushan was tried, in a large room visited by thousands of citizens, there hung a large canvas sign for several weeks before the trial showing a grotesque figure in convict stripes marked

"Shushan", which was represented to say: "I tried to fix de jury".

(l) The subsequently successful candidate for governor in the election which took place about three weeks after Shushan's trial ended, went about the State shortly before Shushan's trial calling the roll at political mass meetings of what he termed the "rogue's gallery", in which he specifically named Shushan, as was repeated in the newspapers.

(m) The subsequently successful candidate for attorney-general, in the same election, likewise went about the State shortly before Shushan's trial exhibiting at political mass meetings a large picture of Shushan's "mansion", usually referred to in the newspapers as being on the "Gold Coast", and once referred to by the Times-Picayune as his "big house", with quotation marks.

(n) After Shushan first applied for a continuance of his case until after the election, a New Orleans newspaper published an editorial comment that: "There is a movement now on foot, planned and executed by judicial stooges of the administration, to not bring to trial **all these culprits** who have been indicted **until after the election".**

(o) Although a delay in trial of only a few weeks, until after the election, would have relieved much of the fever-heat of the campaign, and its inevitable prejudice against Shushan, and the accused made an early and timely plea for such consideration, Special Prosecutor Rogge was insistent that the trial should be held during December, and it was hardly a coincidence that this was the wind-up month of the political campaign.

(p) Although Shushan's counsel appealed, in the

alternative, as early as November 7th, 1939, for protection of the accused by contempt action against the hostile newspapers, the trial judge refused to rule on that application for a whole month, **the month actually preceding the beginning of the trial,** during which the barrage of prejudicial publications continued.

(q) After the trial opened, the newspapers continued their attacks on Shushan, so unfairly in two instances, that the trial judge could no longer fail to act on the complaints of Shushan's counsel, and on December 7th, 1939, he ordered contempt proceedings instituted against two New Orleans newspapers; these actions being for only two mild instances, out of hundreds more aggravated, which had been going on for weeks, necessarily to the knowledge of the men later drawn on the jury panel; **but even in ordering the contempt actions for such obstruction of justice the trial judge declined to allow a mis-trial.**

The foregoing paragraphs (a) to (q) merely summarize the trend of the campaign of prejudicial publicity which was carried on from July 22nd, 1939, until December 22nd, 1939, the day the verdict of guilty was returned, or for exactly five months.

Petitioner Shushan did not sleep on his rights when the alliance between the New Orleans newspapers, the political candidates and spell-binders, and Assistant Attorney-general Rogge were making this mass assault on him.

The first indictment by the federal grand jury at New Orleans against Shushan, in connection with the Levee Board bond refunding operation, was returned on August 21, 1939, almost one month to the day after the Times-Picayune had first opened up on him with the

"financial advice" cartoon about the buzzards and the pelican.

A substituted indictment, which was for the purpose, we understood, of including additional mailing counts, was returned by the federal grand jury on October 17th, 1939.

The newspapers knew when Shushan was going to be tried by Rogge **before his own lawyers had any advices on the subject.** The date was set in the newspapers for December 4th, 1939, long before the substituted indictment.

Why the month of December was set by Rogge may be subject to other plausible explanations, but the fact remains that this was the time when a conviction would do the January election the most good, not too soon to be forgotten by the voters, not too late to have its effect at the polls.

The government's subsequently announced plan was to arraign defendants on November 7th, 1939, in order to get all preliminary pleadings out of the way by the proposed beginning of the trial on December 4th, 1939.

When the defendants appeared before the bar of Judge Borah's court on this first occasion on November 7th, 1939, counsel for the defense took immediate steps to oppose the trial until after the Democratic primary election, which was to take place on Tuesday, January 16th, 1940. These steps were taken immediately in order to avoid any argument afterwards that we had waited until the government had gone to great expense in summoning witnesses, etc., before we made our motion for a continuance.

The steps which we took on November 7th, 1939, were to file a petition on behalf of all five defendants

for contempt against the New Orleans Item and the New Orleans Tribune (see page 572 volume I of transcript), and another petition of all of the defendants for contempt against the Times-Picayune and The States (see page 578). These newspapers were coupled in this manner in the petitions because The Item and The Tribune are published by the same people, and the Times-Picayune and The States are published by the same people. The petitions speak for themselves, and there were attached to The Item petition some 34 clippings, which have been carried up in the original; while there were attached to the petition against the Times Picayune-States some 48 clippings, which have been carried up in the original, both in volume 23 of the bill of exceptions.

At the same time that we presented these joint petitions for contempt, each defendant filed a motion for a continuance of the trial until after "the conclusion of the current political campaign in Louisiana, and a reasonable time thereafter for the prejudicial heat and feeling thereof to pass away". The petition for a continuance of Shushan filed on November 7th, 1939, is found on page 584 of the transcript.

There was made part of this petition all of the four newspapers, the Times-Picayune, The States, The Item and The Item Tribune, and the publication of James H. Morrison, a candidate for governor, known as The Farmer's Friend, being all the issues of said newspapers since August 1, 1939, to date, and for the convenience of the court, Shushan also filed certain scrap books of the outstanding articles and cartoons clipped from other copies of the said newspapers to which the court might conveniently refer in considering the matter.

The various defendants also presented, as part of the petitions for a continuance, the affidavits of 113

citizens of the district averring that the defendants could not hope to obtain a fair trial until after the termination of the current political campaign (see Transcript, from page 767 to page 931, for these affidavits).

It seems to us most important to this case that over 100 citizens of the judicial district gave their sworn opinions to the trial judge that the temper of the public was such that the defendants could not hope to get a fair trial until the political campaign was over, and, although not a single affidavit or other form of proof was offered by the prosecution to contradict these citizens, most of whom were well-known men of substance and responsibility in the community, Judge Borah simply ignored these affidavits.

In fact, the New Orleans States that afternoon quoted Assistant Attorney-General Rogge as ridiculing Shushan's plea for a continuance, as follows:

> "These affidavits filed by the defense reminded me of a German election," declared the Assistant Federal Attorney-General in a modulated voice. "They went around among their friends. Why, this is a jury trial, not a plebiscite."

It is, of course, a natural and logical conclusion that one does not go to his enemies for advice of this kind. Assuming that 113 citizens of the judicial district were friendly to the defendants, does that of itself destroy their uncontradicted evidence of conditions existing in the district which they believed would temporarily make a fair trial impossible? Where the alternative is merely a matter of short delay, and the plea for that delay was timely made, was the trial judge justified in disregarding the opinion of 113 citizens, men moving in circles of life from which the jurors would come, on the sarcastic

opposition by the prosecutor about "a German election", and nothing else?

Usually when affidavits of this kind are tendered a judge in a judicial proceeding, and are accepted in the record, the method of opposition is to furnish proof to the contrary by counter-affidavits, not wave the matter aside as "a German election". No such contradictory proof was offered by the government, and when Judge Borah went ahead with the trial in the month of December, he did so in the face of the opinions of 113 citizens of the district that the trial, under political conditions then existing, could not be a fair trial.

At the session of the court on Monday, November 7th, 1939, at which the defendants' first petitions for a continuance until after the election were filed, and, in the alternative, for some form of contempt action to restrain the newspaper campaign of prejudice and invective, Judge Borah took no action whatever. He continued the arraignment and allowed the defendants ten days, or until November 17th, 1939, to file any further pleas.

The move for a continuance until after the election, and the prayer for contempt actions, **not acted on by the court,** seemed the signal for more vigorous attacks on Shushan and to discourage the trial's postponement.

On November 17th the defendants filed a lengthy **supplemental petition for contempt** proceedings against all four newspapers in one supplemental petition (see page 635 of Transcript). Attached to this supplemental petition were 58 clippings from various New Orleans newspapers (which have been carried up in the original, and are to be found in volume 23 of the bill of exceptions).

There was also filed on this date, November 17th, 1939, a **supplemental petition for a continuance** until after the election by each of the defendants (Transcript page 658).

Counsel for Shushan also filed with Judge Borah a carefully prepared typewritten brief of authorities on the court's power to act for contempt in such a situation, to which the prosecution never took the trouble to even reply, as far as we know.

On Wednesday, November 22nd, 1939, the defendants appeared before Judge Borah to argue the various pleadings which had been filed on November 17th. On this date the defendants filed a **second supplemental petition for contempt** referring to newspaper articles which had appeared in the five days since November 17th, 1939. These exhibits consisted of 26 clippings, which are to be found in volume 23 of the said bill of exceptions in the clerk's office of this Court.

On this occasion, November 22nd, 1939, counsel for Shushan asked the court for some action upon the petitions for contempt and the two supplemental petitions which had been present, asking that "steps be taken under authority of the court to protect these defendants from this kind of publicity". (Transcript, page 700). Judge Borah replied, "The court has not read the petitions as yet". (Transcript, page 700). Both original petitions for contempt **had then been before the court for 15 days.**

Counsel for Shushan asked the court if it would be possible to indicate to the defendants when some action may be taken by the court. Judge Borah answered with one word—"No". (Page 700 of Transcript). The court then proceeded with the argument of the various demurrers, pleas in abatement, etc.

At this time defense counsel filed in court an affidavit of James H. Morrison, candidate for governor and publisher of the vitriolic newspaper called the Farmers' Friend. This affidavit is found on page 931 of the transcript. With Mr. Morrison's affidavit we filed a large canvas sign which had been hanging for days in the large general room of the Morrison headquarters in the old Citizens Bank Building in Gravier Street between Camp and St. Charles, in New Orleans, about four blocks from the federal courthouse. This large canvas sign had been observed by thousands of people. It represented a line of convicts in stripes, with one marked "Shushan" saying: "I tried to fix de jury".

This was a direct echo of the Rogge campaign of circulation of information from the grand jury room that "jury tampering" in the 1935 Shushan case was being investigated.

The sign's presence in the Morrison headquarters in the business district of New Orleans, depicting Shushan in convict stripes, was a matter of general knowledge in the community in the weeks **immediately before his trial started.**

We also offered in evidence a photograph of the Morrison "convict parade" being used at political mass meetings throughout the State in the weeks **immediately before** Shushan's trial started. This photograph is reproduced at page 933 of the transcript. It shows a truck carrying a line-up of "convicts" in striped suits, behind the bars, including several men already under conviction in the same federal court. "Shushan" is the third figure from the left, wearing a placard bearing the name of this defendant on his chest, partly concealed in the photograph by the bars of the cage. Next to "Shushan" is standing an already convicted man, "Weiss". The infer-

ence throughout these "convict parades" and "convict cartoons", all paraphernalia of the current political campaign, was unmistakebly a pre-judgment of Shushan's case to the general public, from which the jurors to try him had to come.

The argument on the demurrers, etc., on November 22nd, lasted until late in the day. The next day was a holiday, Thanksgiving Day. On the morning of Friday, November 24th, the defendants and their lawyers returned to court expecting to receive decisions by the court on the various matters pending, but Judge Borah asked for further argument on the demurrers and these arguments lasted all day Friday. On Saturday, November 25th, 1939, all preliminary matters were decided by Judge Borah, except the prayers for contempt actions against the newspapers. He was silent on these, but he refused any continuance, and defendants were ordered to be in court for arraignment on Tuesday, November 28th, 1939.

On this date the defendants were arraigned and pleaded not guilty to the indictment. On this occasion we again asked the court to rule on the petitions for contempt theretofore filed herein and the court entered an order at the request of counsel for the defendants that a bill of exceptions should be reserved in favor of all defendants on the failure of the court to act before the date of the trial on the petition for contempt proceedings against the newspaper publishing companies (see Transcript page 332, Transcript, page 938).

The case was then called for trial on Monday, December 4th, 1939. When this day arrived, counsel for Shushan had been struggling for exactly four weeks to obtain the protection of the court against the barrage of prejudicial newspaper publicity.

If the trial judge had any delusions that Mr. Rogge and the newspapers were going to treat the matter any more fairly while it was actually on trial than they had done prior to the trial, he was speedily undeceived. Within the first three days of the trial two newspapers, the New Orleans Item and the Item-Tribune published articles and headlines so palpably false and prejudicial to Shushan, that their publishers and reporters were then cited for contempt.

These actions for contempt were filed by the United States Attorney, Mr. Viosca, on December 12th, 1939. There were two proceedings, docket No. 19,855, against the Item Company, Ltd., and J. W. F. Moore, night editor of the Tribune (pages 4360 of the transcript) for the prejudicial matter published in the morning Tribune the day after the trial opened, Tuesday, December 5th, 1939; and docket No. 19,856, against the Item Company, Ltd., and James A. Wobbe, assistant city editor of the Item (page 4392 to 4416 of the transcript) for the prejudicial matter published in the Item the afternoon of Thursday, December 7th, 1939.

The defendants in both proceedings were tried by Judge Borah on December 14th, 1939, eight days before the verdict in the main case, and all were found guilty of contempt of court. The Item Company, Ltd., was fined $100.00 on each of the two cases, and the offending employees, Moore and Wobbe, were each fined $25.00.

These contempt actions came too late to ever afford Shushan a fair trial. As long as the outcome of the political campaign was undecided, and men's passions were worked up over that campaign, Shushan's conviction was merely a means to a more important end in mass public opinion, and any jurors then selected to try him were bound to have been sensible of that influence.

The convictions on December 14th, 1939, of New Orleans newspapers for contempt, are not so improtant because of the specific obstructions of justice on December 5th and December 7th, 1939, which brought them about. Those convictions for contempt are more important to this appeal **because they constitute confirmations of everything which Shushan represented to the Court from November 7th to December 4th, 1939, when he tried to get either a continuance of his case until after election or some protection from the prejudicial publicity which had been going on since July.**

It was a gross abuse of the trial Court's discretion and a denial of due process to have refused the comparatively short continuance until the atmosphere would have cleared of the political excitement and partisanship.

It was a grave matter for the trial Court to have an accused ask for protection against such powerful and insidious influences on November 7th, 1939, and then state 15 days afterwards from the bench, in the presence of representatives of the agency complained of:

> **"The Court has not read the petitions as yet."** (Transcript, page 700).

At the same time compelling the defendants to proceed to trial on December 4th, 1939, in the face of repeated complaints that the things complained of were continuing daily.

We seriously doubt if there has ever been a case in the nation where an accused was forced to trial under such aggravated conditions, and where he had taken such timely steps to ask the trial Court for relief, and preserved such a careful record of the injustice done him. While we submit that our appeal on this point is probably without an exact parallel in American jurisprudence, we

can refer to the noteworthy precedent of this Honorable Court in deferring arguments in the celebrated *Dredd Scott* case until after the presidential campaign of 1856 (60 U. S. 393; The Supreme Court of the U. S. in History, Warren, Vol. 3, page 7).

Just as the disturbed conditions in the nation at the time of this presidential campaign during the anti-slavery agitation made it more in keeping with due process to await the hearing of the *Dredd Scott* case until after the election had been held, similarly did the condition of public excitement in Louisiana in December, 1939, necessitate a delay of Shushan's case beyond the primary of January 16th, 1940.

This was particularly true because the conduct of the Assistant Attorney-General himself had put the brand of campaign partisanship on Shushan's case and he had improperly lent a powerful hand to propagandize it as a symbolic case in its effect upon the impending election. The court of appeals said in the opinion below: "The newspapers here sometimes went too far, and the prosecuting attorney ought not to have contributed to what became an abuse." (Tr. Vol. VIII, page 4808).

The case at bar differs, of course, in its basic facts from *Chambers v. Florida*, 309 U. S. 227, 60 S. Ct. 472, which was argued before your Honors almost to the day that Shushan was being sentenced in New Orleans, but it is identical in its relation to the constitutional principle that any influence which disturbs the tranquil and orderly progress of judicial due process invalidates a conviction for crime. We can find no more appropriate language with which to conclude this brief than a short quotation from the eloquent opinion of Mr. Justice Black:

> "Under our constitutional system, courts stand against any winds that blow as havens of

refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

Respectfully submitted,

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Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 913

ABRAHAM L. SHUSHAN, ROBERT J. NEWMAN, NORVIN T. HARRIS, JR., HENRY J. MILLER AND HERBERT W. WAGUESPACK,

versus

UNITED STATES OF AMERICA.

PETITION OF HERBERT W. WAGUESPACK FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF SAID PETITION FOR A WRIT OF CERTIORARI.

WARREN DOYLE,
RENE' J. WAGUESPACK,
W. J. WAGUESPACK, JR.,
Attorneys for Petitioner.

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IN THE

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OCTOBER TERM, 1940.

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ABRAHAM L. SHUSHAN, ROBERT J. NEWMAN, NORVIN T. HARRIS, JR., HENRY J. MILLER AND HERBERT W. WAGUESPACK,

versus

UNITED STATES OF AMERICA.

PETITION OF HERBERT W. WAGUESPACK FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Herbert W. Waguespack, a citizen of the United States of America, domiciled in the State of Louisiana, respectfully presents this, his application for a writ of certiorari to review the final judgment of the

United States Circuit Court of Appeals for the Fifth Circuit, in the above numbered and entitled criminal case.

OPINION BELOW.

Petitioner was indicted in the United States District Court for the Eastern District of Louisiana for the crime of fraudulent use of the mails in violation of Section 215 Criminal Code, 18 U. S. C. A. 338, and was convicted and sentenced on January 2nd, 1940, to be imprisoned for thirty months on each of seven counts and to pay a fine of $1,000.00 on each of two counts in the indictment, the prison sentences to run concurrently. (Rec. Vol. 1, p. 456.)

Petitioner thereupon appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and on the 18th day of January, 1941, that Court handed down its opinion affirming the judgment of conviction. (Rec. Vol. 8, p. 4801; 117 Fed. (2nd) 110.) Petitioner thereupon filed with said Circuit Court, within the delays allowed by law, his petition for a rehearing, (Rec. Vol. 8, p. 4842) which was denied on the 3rd day of March, 1941. (Rec. Vol. 8, p. 4860.) The mandate of said Circuit Court was stayed by its order for thirty days from March 3rd, 1941, to enable petitioner to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit. (Rec. Vol. 8, p. 4862.)

STATUTE INVOLVED.

The statute under which petitioner was convicted, *(Sec. 215, Criminal Code; Title 18, U. S. C. A. 338)* reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package writing, circular, pamphlet or advertisement, shall be fined not more than $1,000.00, or imprisoned not more than five years, or both". (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130).

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended *(Section 347, Title 28, U. S. C. A.)*, making it com-

petent for this Court to review by certiorari any case, civil or criminal, in a Circuit Court of Appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED.

The indictment (Rec. Vol. 1, p. 103) charged the defendant with devising a scheme to defraud and to obtain money by means of false pretenses and representations from the Orleans Levee District, the State of Louisiana and the people of the State. It further charged that the firm of Newman and Harris entered into a contract with the Board of Commissioners of the Orleans Levee District to undertake to refund some of its outstanding bonds so as to reduce the interest rates and charges. It was charged that the contract was obtained by bribing this petitioner and that one Charles A. Fitere was bribed to act as a spy, and that in furtherance and in consummation of the scheme, the mails were used by depositing in the mails, and sending through the mails, various letters. The fraud and false pretenses relied upon by the Government was in obtaining the contract by the bribery of Waguespack, and second, an erroneous and fraudulent calculation of the amount of the savings saved by the defendant to the Levee Board, in that the savings in interest were not discounted to their present value.

The contract provided that Newman and Harris were to pay all the expenses of the undertaking, to guarantee the

success of the refunding by forfeitable deposits of one per cent of the par value of the refunding bonds offered for sale, which deposit was to be retained by the Board as liquidated damages in the event of failure to obtain an acceptable bid, and to pay a portion of the premiums payable upon the called bonds if an acceptable bid was received but was not sufficient to fully cover said preminums, and Newman and Harris were ineligible to bid upon the bonds offered for sale. In consideration of the successful execution of the contract, Newman and Harris were to receive 25% of whatever savings and gains they might effect for the Board through the said refunding operations. (Rec. Vol. 1, p. 237; Vol 5, p. 3032.)

The contract was submitted and explained to the members of the Board, who exercised their independent and uninfluenced judgment in unanimously voting to award it. (Rec. Vol. 3, pp. 1619, 1640, 1641, 1650.)

It was executed in accordance with its terms and resulted in reducing the interest payments of the bonded indebtedness of the Board to the extent of nearly $2,000,-000.00. (Rec. Opinion, Vol. 8, p. 4817) The prosecution contended that the savings resulting from this reduction was fraudulently computed in that it was the gross savings over a period of many years and that the actual savings computed upon the present value of the amounts due upon the savings and savings which might afterwards accrue, was the proper basis upon which to compute the remuneration of Newman and Harris.

The evidence showed by the testimony of experts from all parts of the country that the present value system of

computation was unknown in the bond business, and that the fee for refunding operations was always paid upon the sale of the refunding bonds, and was not discounted to a present value because the savings were not immediately available. As to this charge, the Circuit Court of Appeals held that no false representations had been proven within the meaning of the mail fraud statute, and that while the amount received seemed by its magnitude to indicate fraud or mistake in a civil proceeding, the Court would hesitate to rest a criminal conviction for fraud on this alone. (Rec. Opinion Vol. 8, pp. 4821, 4822.)

The bribery was based upon the fact that petitioner had a contingent interest of 11-2/3% in the net profits, *if any*, that might be obtained by Newman and Harris. That interest subsequently amounted to less than 2-1/2% of the savings in interest obtained by the Board through the refunding operations, and was obtained by petitioner for valuable legal services which made valid an otherwise invalid contract. (Rec. Vol. 3, pp. 1918, 1922, 1995, 2142, 2145 and 2154; Vol. 4, pp. 2392, 2410.) He had neither the power nor authority to award or execute the contract himself. The Board had its own staff of paid attorneys (Rec. Vol. 3, p. 1643) and petitioner served as a member of the Board without pay, and owed the Board no legal professional services. His rights and obligations as a member of the Board were governed by particular statutes of the State of Louisiana and under a reasonable interpretation of those statutes he had a right to his interest in the contract. (Rec. Vol. 3, pp. 2146-2153, 2190; Vol. 4, pp. 4339, 4340.) There was no conflict of interest with the Board, but the same interest to effect as much

savings and gains as possible, and petitioner could not know whether he would make anything at all out of his contingent interest and he could not make anything unless the Board also profited.

Your petitioner made full proof that his participation in the profits of the contract was not bribery under the Louisiana Statutes, but, on the contrary, that under said statutes, he had a right to enter into and participate in the profits of the transaction.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI ARE:

1. That the defendant's constitutional immunity from being compelled to be a witness against himself has been violated by the introduction in evidence, over his objection, of certified copies of his income tax return (made under compulsion of the penal clauses in the revenue laws) in the prosecution for an offense having no relation to the Internal Revenue Laws. This question has never been decided by the Supreme Court of the United States.

2. That the defendant's constitutional privilege of trial by jury has been violated by the empanelling of two alternate jurors, making a jury of fourteen, the alternate jurors sitting with the other twelve during the whole course of the trial, mingling and associating with them from the beginning of the trial until the Court's charge had been delivered to the jury, and then being discharged and taking no further part in finding the verdict. The Act of Congress of June 29th, 1933, C. 309, 47 Statutes,

380, violates the 6th Amendment, Article 3, Section 2, Clause 3 of the Constitution. Trial by jury means a jury of twelve, no more and no less. This question has never been decided by the Supreme Court of the United States.

3. That the defendant was deprived of his constitutional guarantee of a trial by due process of the law when the Assistant Attorney General of the United States in charge of the prosecution, for the purpose of creating prejudice against defendant, and precluding him from having a fair and impartial trial, improperly joined with the partisan public press and partisan politicians, in the midst of a political campaign, and by statements and interviews, made and given by him before the trial, and his conduct during the trial, created such a great and bitter prejudice against the accused as to preclude the possibility of his obtaining a fair and impartial trial by a fair and impartial jury, undisturbed by political prejudice and public clamor, and where a continuance until the pending election was over, and public excitement and prejudice had subsided was denied by the trial court.

4. That the obtaining of a contract, which was in itself without fraud, by bribing a public official is not an offense cognizable under the mail fraud statute, and is not such a false or fraudulent pretense or representation or such a scheme to defraud as is contemplated by and included in that statute. This question has never been settled by the Supreme Court of the United States.

5. That there is no scheme to defraud within the meaning of the Mail Fraud Statute, 18 U. S. Code, Section 338,

when the scheme is such that the ONLY MEANS by which the alleged victim could be deprived of money or property is a written contract which provided for the payment to the accused of 25% of whatever savings and gains they might THEMSELVES make, through their skill, efforts, expenditures, and financial risks, and when it is not charged that the alleged victim would have otherwise made any savings and gains at all, and there were no false representations, claims or promises, and the contract was skillfully and successfully executed in accordance with its terms and resulted in savings and gains of almost two million dollars in interest to the alleged victim. This question has never been settled by the Supreme Court of the United States.

TRANSCRIPT ANNEXED.

The record having been printed for the use of the Court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, and ten copies of the record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court, having been already filed under number .... of the docket of this Court we refer and attach to this petition the said record as though separately filed herewith.

SUPPORTING BRIEF.

Petitioner also files herewith and makes part of his application his brief in support thereof.

PRAYER.

Wherefore petitioner respectfully prays that a writ of certiorari may issue to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, to the end that this case may be reviewed and determined by this Court; and that the judgment of the said Fifth Circuit Court of Appeals may be, in due course, reversed and set aside and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced by law and discharging him forthwith; and petitioner further prays for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

WARREN DOYLE,
RENE' J. WAGUESPACK,
W. J. WAGUESPACK, JR.,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

1. The Defendant Was Deprived of His Constitutional Rights by the Admission in Evidence Against Him of Defendant's Income Tax Return, Made Under Compulsion of Federal Statutes, Which Provide Severe Pains and Penalties for the Failure to Make a Return, for Omitting from the Return Any Receipt of Money, Whether Lawful or Unlawful, Which May Be Income, or for Fraudulently Misstating or Omitting Any Item of Income.

This petitioner, Herbert W. Waguespack, received out of the proceeds of the contract between the Levee Board and Newman and Harris, a sum of approximately $46,000.00. He entered this amount on his income tax and returned it to the Bureau of Internal Revenue, which return he swore to as provided by law. The return was made long before the validity of the contract was questioned, and long before any prosecution had been begun, or any question of criminality in the transaction had been raised. Upon the trial of the case, for the purpose of showing that your petitioner had received this money, the Government offered in evidence a certified copy of his income tax return containing this amount. (Rec. Vol. 2, p. 1495; Vol. VI, p. 3595.) Your petitioner in due time and at the moment of offer objected to the receipt of the income tax return in evidence, which objection was overruled. (Rec. Vol. 2, pp. 1495-1497.)

The income tax return was clearly compelled by the revenue statutes of the United States and could, in no

sense, be said to be voluntary. *(The Revenue Act of 1936, Section 145 (a), 26 U. S. C. A., Internal Revenue Acts.)*

The Acts of Congress and Treasury Regulations 74, authorizing the use of income tax returns in any case in which the Government is interested in the result can only mean where the Government has an interest in the protection of its revenue and its taxing powers, and not in all cases where the Government has only a general and somewhat fictional interest, as it has in prosecutions for offenses in no wise connected with the Government fisc, revenue or taxing powers. This statement is borne out by the discussion in Congress when the bill was under consideration. *(Senate Proceedings—Congressional Record, Feb. 4-9, inc., 1926.)* There it was not even suggested that the return might be used in any and all prosecutions. The Statute provides for inspection only, and not use of the returns. Congress was conscious of the fact, of course, that if a statement was compelled by the Government to be made by an individual, that the use of that statement in evidence in a criminal prosecution for other offenses would be a violation of the constitutional provision against compelling a person to be a witness against himself.

If a statute permits the use of income tax returns against the maker in a prosecution for a criminal offense not connected with the Federal Revenue, then the statute is unconstitutional. If the statute merely means that it may be used only in cases where the return itself is part of the *res gestae*, then the statute is constitutional, and it requires no citation of authorities to establish the rule

that where a statute is susceptible to two constructions, one of which will make it unconstitutional and the other constitutional, the Courts will always adopt the construction which upholds the constitutionality of the Statute.

The 16th Amendment carries not the slightest implication that it repeals or modifies the Fifth Amendment. The law is and always has been during the history of this Government that any compulsion in the giving of testimony or a statement, sworn to or unsworn, presupposes and grants immunity to the person making such statements from any punishment, or the use of such statement in order to establish guilt of the person making the statement in any criminal matter, and that one's private papers are not only immune from search and seizure, but that they may not be used against the owner for the purpose of incriminating him unless he voluntarily surrenders them. All of the elements of compulsory incrimination are present in this case: 1. The making of the statements is coerced by penalty of fine and imprisonment; 2. They were used over the objection and to the detriment of the person thus compelled to make the statement; 3. The statements are compelled to be made under oath; 4. The private papers of the defendant were unlawfully seized and used to his detriment; and 5. He was given no opportunity and had no opportunity of protecting himself from the use of the thus coerced statements.

It is suggested in the opinion of the Circuit Court of Appeals that he should have claimed his immunity at the time of making the income tax return, or should have omitted the items in dispute from his return. We suggest

that this holding of the Circuit Court of Appeals is untenable. There is no way, no opportunity and no manner in which such a claim of immunity could be made and no person or office to which it could be made. Your petitioner was incapable of defending himself at the time of making his income tax return from the use which was made in the trial of this return, because he had at that time no knowledge nor even suspicion that this prosecution would ever arise, and being unconscious of attack, was incapable of defense. The second suggestion of the Court that the item be omitted from the income tax return merely means that petitioner should commit another crime in order to be able to claim his immunity when a future prosecution, not then in being, not even contemplated or expected, might be brought against him. The holding that a person should commit a criminal offense in order to preserve his constitutional rights is unique and untenable.

We offer to the Court a few of the leading authorities on this subject:

Thomas Bram vs. U. S., 168 U. S. 532, Syl.: .....

> "4. A confession which is not voluntary is not admissible in evidence under the Fifth Amendment to the Federal Constitution, declaring that no person shall be compelled in a criminal case to be a witness against himself."
>
> "5. The voluntary character of an alleged confession depends upon the question whether the making of the statement was voluntary and without inducement or compulsion, and not whether the particular communications contained in it were voluntary or not."

Mr. Wharton in his *Criminal Evidence,* page 1377, Vol. 2, says:

> "Confessions of accused, where compelled to answer under oath".
>
> "But the testimony of an accused party, taken as such, is not admissible, when such accused party is put on his oath and sworn and examined, not on his own motion, but on the motion of the prosecution. This rule is founded upon the unreliable as well as the inquistorial character of such statements."

In *Boyd vs. U. S., 116 U. S. 634; 29 L. E. 746:*

> "SUITS FOR PENALTIES AND FORFEITURE".
>
> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment."

In the case of *U. S. vs. Edgerton, 80 Fed. 374,* the Court said:

> "It is fatal to an indictment that the defendant was called to testify before the Grand Jury in the par-

> ticular matter from which it resulted, without being informed or knowing that his own conduct was the subject under investigation".

In *Counselman vs. Hitchcock, 142 U. S. 551, 35 L. E. 114,* it was held:

> "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled when acting as a witness in any investigation, to give testimony which might tend to show that he himself, had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard".
>
> *C. F. Edwards vs. U. S., 85 L. Ed. 563.*

Authorities without end could be added to show the universal application of this rule and a clearer violation of the constitutional protection and immunity of the accused could hardly be imagined.

2. The Constitutional Privilege of the Defendant of Trial by Jury Is Violated by Empanelling Two Alternate Jurors, Making a Jury of Fourteen.

The phrase "trial by jury" as used in the Constitution, is derived from the Common Law as it existed at the time the Constitution was adopted, and means a jury of twelve, no more, no less, *(Patton vs. U. S., 281 U. S. 287, 74 L. E. 854),* and any change or variation in the number

of jurors made or attempted to be made by Congress is a violation of the Constitutional provision and null and void.

Thompson vs. Utah, 170 U. S. 343, 42 L. Ed. 1061, 18 Supreme Court 524.
Maxwell vs. Dow, 176 U. S. 581, 44 L. E. 597, 20 Supreme Court 48.
American Publishing Co. vs. Fisher, 166 U. S. 464-468.
In re: Debs, 158 U. S. 564.

While it may be said that the alternate jurors do not necessarily decide the case, still if one or more of the regularly empanelled jurors becomes incapacitated during the trial, either one or both of the alternate jurors then become regular jurors and part of the originally empanelled jury. In the meantime they sit with and mingle with the twelve original jurors, and may take part in any discussion of the case or the evidence or the circumstances with the members of the original jury before the issue is finally submitted to the jury at the close of the evidence, arguments and Judge's charge. To all of these things they listen with the originally empanelled jurors, co-mingle with them and may discuss and remark upon the evidence and incidents of the trial, thereby either influencing or at least distracting the opinions of members of the original jury.

Under such circumstances it cannot be said that the original jury is not subject to outside influences beyond the influence of the members of the original jury. It is plain that "the trial by jury" means not only a decision by a jury of twelve, no more and no less, but that it also means that in receiving the evidence, in weighing the

arguments and applying the charge of the Court, that no other person shall be allowed to in any way distract, influence, or persuade the judgment and the consideration of the elements of the trial except the original twelve jurors.

The province of the jury is not only their final verdict, but is also the influences, the considerations, the impression and the discretion and judgment of the jury which motivates them in arriving at their final judgment.

It has repeatedly been held that the co-mingling with the jury of persons other than the fellow members of the jury, even the officers of the court, in their consideration of the case and the impressions that are made upon their minds concerning the issues of the trial by the evidence, arguments and charge of the Court, will vitiate a verdict for the reason that, under such circumstances, the verdict is not the free, untrammelled, uninfluenced and undistracted consideration and judgment of the jurors.

So true is this that any discussion by an outsider with the jury or members of the jury is presumed to have interfered with their free judgment, and it is not necessary to show that they were actually swayed by such discussions or comments, and the verdict is vitiated without any showing of positive injury.

If fourteen men may sit upon a jury, hear the evidence, the arguments and the charge of the court, then any unlimited number may so sit, even to the entire population of a whole community, so long as the actual ver-

dict is fathered and adopted by the twelve originally drawn, if none of the original twelve be incapacitated or unable to serve to the end of the trial. If two alternates may be drawn, then twelve may be drawn, or any other number may be drawn without violating the constitutional rights of the accused.

If such be the case it is plain that the mere association of the twelve original members of the jury with any number of persons more than twelve is certain to sway their judgment and interfere with their discretion by the effect which the sympathies, the opinions and the leanings of the whole crowd of persons may have upon each other; although there may be no concrete evidence of effect, yet we all know that the intangible ideas of a number of persons sway the ideas and judgments of the individuals composing an assembly.

If the actual rendering of the verdict is alone meant by the term "trial by jury" then we repeat that a whole community may be called to hear and consider a case, so long as a verdict is rendered by the first twelve persons selected. That this is not the case and that "trial by jury" means the action of the jury mentally and decisive upon the whole case, and not merely the rendering of a verdict, is too plain for discussion, and is manifested by the whole theory of the Anglo-Saxon law, by the common law and the American Constitution, Statutes and jurisprudence.

The Circuit Court of Appeals refused to examine the constitutional question here raised because the alternate

jurors were excused before the case was submitted for decision to the twelve first chosen, and that, consequently, no harm was done. In order to arrive at that conclusion the court "PRESUMED" that the alternate jurors did not discuss the case with the other jurors. The rule is well settled that where, in the course of a trial, the constitutional rights of the accused are violated, the question as to whether or not the violation of these rights had any harmful effects should not be considered, otherwise the Constitution may be violated with impunity, and in every case the question would be, not whether the Constitution was, indeed, violated, but what effect that violation had in the opinion of the particular court considering the matter. That is not the law. Where the constitutional rights of the accused are invaded and violated, the whole proceeding is nullified.

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure".
>
> *Boyd vs. U. S., 116 U. S. 616-641, 29 L. E. 752.*

We also refer Your Honors to:

Ex Parte Siebold, 100 U. S. 376, 25 L. E. 719.
Ex Parte Yarbrough, 110 U. S. 654, 28 L. E. 274.
Ex Parte Royall, 1117 U. S. 248, 29 L. E. 870.
Counselman vs. Hitchcock, 142 U. S. 585, 35 L. E. 1114.
Pierre vs. State, 306 U. S. 354, 83 L. E. 757.
Norris vs. Alabama, 294 U. S. 587, 83 L. E. 757.
Hale vs. Kentucky, 303 U. S. 613, 79 L. E. 1074.

3. The Defendant Was Deprived of His Constitutional Guarantee of a Trial by Due Process of Law When the Assistant Attorney General in Charge of the Prosecution Improperly Joined With the Public Press and Partisan Politicians and by Statements and Interviews Made and Given by Him Before the Trial, and His Conduct During the Trial Created Such a Great and Bitter Prejudice Against the Accused as to Preclude the Possibility of His Obtaining a Fair and Impartial Trial by a Fair and Impartial Jury, Undisturbed by Political Prejudice and Public Clamor, and Where a Continuance Until the Pending Election Was Over and the Public Excitement and Prejudice Had Subsided, Was Denied by the Trial Court.

We submit to the Court that this is not merely a complaint that a continuance was denied, but a complaint that defendant was denied due process of law because of public clamor and prejudice deliberately created and fanned by the Assistant Attorney General and his associates for the purpose of bringing the defendant into such public ridicule and disrepute as to make it impossible to obtain a fair and impartial trial. Prospective jurors were coerced, intimidated and influenced by statements that in a previous trial, in which one of these defendants was accused, the jury was bribed and corruptly influenced to acquit the accused; that the Assistant Attorney General was investigating that jury for the purpose of prosecution, although he knew that if any offense had been committed, it was prescribed. The Assistant Attorney General and his aides had conferences with the reporters and representatives of the press and issued almost daily statements of his intention to prosecute, of his intention to send many people to the penitentiary,

and of his belief in the guilt of these defendants and many others. The result of the publication of these statements and the bitter antagonism of the partisan press was such that no juror with any self-respect could fail to fear that he would be subject to contempt and abuse and suspicion of corruption and bribery if he rendered a verdict in favor of the accused. Not only was this true of the citizens called for jury service, but it was also true of citizens who might be called as tales jurors so that the selection of a fair and impartial jury, and the use of the defendant's peremptory challenges was made impossible because the real objection to them was intangible, in that they feared an attack upon their self-respect and reputation in the community, which, of course, they would not admit under questioning, and that this intangible source of partiality permeated the whole array of jurors called during the term of court in which this case was tried. The Court of Appeals characterized the conduct of the Assistant Attorney General as being "improper"; found that the attack upon the defendant by the newspapers and the Assistant Attorney General amounted to an "abuse" and that the newspapers had "gone too far", in their articles discussing the case. The trial Judge found it necessary during the trial to punish for contempt certain representatives of a newspaper and its officials, but refused a motion to withdraw a juror and declare a mistrial.

This conduct on the part of the Assistant Attorney General, the newspapers and partisan politicians, was a deliberate and successful attempt to deprive the defendant

of a fair and impartial trial and, in consequence, of due process of law.

C. F. Berger vs. U. S., 295 U. S. 78.

As Your Honors said in *Dempsey vs. Moore*, 261 U. S. 86, 67 L. E. 545, where the jury was overawed by public opinion in the community to such an extent that they were prevented from considering the defense of the accused and were afraid to render a verdict in their favor, that the accused had been denied due process of law and had not had a trial at all; that the whole proceeding was stricken with nullity and was entirely void.

Frank vs. Mangum, 237 U. S. 309, 335; 59 L. E. 983.

4. A State Offense of Bribery Is Not Cognizable Under the Mail Fraud Statute and Does Not Constitute a Scheme to Defraud Within the Meaning of That Statute When an Otherwise Meritorious Contract Which Is Bound to Result in a Profit to the Allegedly Defrauded Party Has Been Obtained by the Bribery of a Public Official.

Petitioner made full proof that his participation in the profits of the contract was not bribery under the Louisiana statutes, but, on the contrary, that under said statutes he had a right to enter into and participate in the profits of the transaction.

But we assume for the purpose of this argument that the contract between Newman and Harris and the Levee Board had been procured through the bribery of this petitioner.

The Appellate Court held that such bribery would constitute a scheme to defraud within the meaning of the mail fraud statute, for the reason that "no trustee has more sacred duties than a public official, and any scheme to corrupt such a one must, in the Federal law, be considered a scheme to defraud, *because of the essential immorality of an arrangement of that sort*". We contend, however, that such bribery is merely a state offense, and not an offense under the mail fraud statute; that the essential immorality of an arrangement of that sort or of *any scheme*, is NOT sufficient to bring it within the scope and intendment of the mail fraud statute.

Your Honors have repeatedly held that "there are no common law crimes against the United States"; that "regard must ALWAYS be had to the familiar rule that one may not be punished for crime against the United States unless the facts shown PLAINLY AND UNMISTAKABLY constitute an offense within the meaning of an Act of Congress"; that "Statutes creating crime are to be strictly construed in favor of the accused and may not be held to extend to cases not covered by the word used"; and that "before one may be punished it must appear that his case is PLAINLY within the statute".

U. S. vs. Eaton, 144 U. S. 677.
Donnelly vs. U. S., 276 U. S. 505.
Fasulo vs. U. S., 272 U. S. 620.
U. S. vs. Resnick, et als, 299 U. S. 207.
U. S. vs. Wiltberger, 5 Wheaton 76.
U. S. vs. Lacher, 134 U. S. 624.
U. S. vs. Chase, 135 U. S. 255.

The crime of bribery was recognized by Congress as a separate crime, when it enacted Section 39 of the Crim-

inal Code. Bribery is not covered PLAINLY AND UNMISTAKABLY by the provisions of Section 215 of the Criminal Code. That Section PLAINLY covers many varied offenses through the use of the mails, but bribery is not one of them; it denounces not only schemes to defraud or for obtaining money or property by means of false pretenses, representations or promises, but also specifically denounces the use of the mails for counterfeit or spurious coins, paper money, etc.,—for certain specific swindles,—and for dealing in certain green goods and articles, etc. *By its very language,* the statute is *limited* to the many specific offenses punishable therein.

In construing the meaning of a "scheme to defraud" Your Honors held, in the case of *Fasulo vs. U. S.*, 272 U. S. 620, that the language of the mail fraud statute was not broad enough to embrace "all means that are dishonest" and "all dishonest methods or schemes"; that the obtaining of money by means even more reprehensible than false pretenses was not enough to bring such schemes within Section 215; that the obtaining of money by threats to injure or kill, by the use of the mails for that purpose, did not constitute an offense under the mail fraud statute.

If schemes more reprehensible than false pretenses do not necessarily come within the scope of Section 215, it follows that the essential immorality of a scheme is NOT sufficient to constitute a scheme to defraud, and that the Appellate Court erred in so holding.

A scheme to defraud requires, 1, an intended or actual pecuniary or property injury, and, 2, the specific means

of deception to bring about the deprivation or injury that is intended or inflicted. There are many statutory crimes which consist of pecuniary or property injury, but which are not schemes to defraud, such as coercion, robbery, embezzlement, extortion, and forgery. All these are statutory crimes denounced by specific statutes, and althought they all involve pecuniary or property injury, they are differentiated by the means used to effect that end. In the *Fasulo case, supra,* Your Honors held that a scheme to inflict pecuniary or property injury by means of threats to injure or kill, was not a scheme to defraud. In *Norton vs. U. S.*, 92 Fed. (2nd) 753, it was held that coercion did not constitute a scheme to defraud because the means used was not deception. In *Naponiello vs. U. S.*, 291 Fed. 1008, it was held that although obtaining money through threats is a more heinous crime than obtaining money through deception, such a case was not within the mail fraud statute because threats are not deceits. In *U. S. vs. Smith,* 29 Fed. (2nd) 926, it was held that embezzlement did not come within the mail fraud statute. In the case of *Harrison vs. U. S.*, 200 Fed. 662, after an exhaustive review of the authorities, the Court held that there could be no scheme to defraud when the money or property is not to be obtained by deception as to the substantial identity and essentials of that which may be promised or undertaken.

The crime denounced by Section 215 is the ancient crime of obtaining money or property by means of false pretenses. Bribery is neither a false pretense nor a false representation nor a false promise. In the common law, it has always existed as a crime separate from and inde-

pendent of the crime of obtaining money by false pretenses. When Congress passed the Mail Fraud Statute, it knew that bribery was a separate crime, as shown by Section 39 of the Criminal Code.

We contend that bribery is not punishable under Section 215 any more than extortion, coercion, and embezzlement. It is persuasive that Congress in enacting statutes to punish offenses against operations of Government, 7 Fed. Code Ann., Title 18, Chap. 4, as distinguished from offenses against the Postal Service, recognized the differences which exist between the various crimes which involve the deprivation of property, and expressed the necessity and intention to pass specific statutes to punish these various offenses. These laws are contained in Sections 27 to 84, inclusive, of the Criminal Code, and provide punishment for the various offenses of forgery, embezzlement, fraud, extortion, robbery, counterfeiting and *bribery*. Bribery is covered by Section 39 of the Criminal Code and it is inconceivable that Congress would have passed Section 39 if it intended that the crime of bribery be punishable under some other of the foregoing Sections. When Congress came to consider offenses against the Postal Service, however, it *did not* include bribery any more than it did extortion or coercion, in spite of the fact that it did provide for the punishment of a great many other crimes against the Postal Service.

If Congress HAD specifically provided in Section 215 that the use of the mails for bribery was an offense, there would be no question that bribery was cognizable under that Statute. But this extraordinary situation

arises: The defendants in this case could not have been convicted under such a specific statute, because no count of the indictment charges that the mails were used for bribery. And yet, if the obtaining of a contract by means of bribery and the subsequent use of the mails in the execution of that contract constitutes a scheme to defraud within the meaning of Section 215, then the Statute is now *more potent* to punish the crime of bribery than it would be if the use of the mails for bribery was specifically punishable under that statute. It would seem, therefore, to be against all reason to say that the offense of bribery falls within the scope of the mail fraud statute.

5. There Can Be No Scheme to Defraud When the Scheme Is Such That the Only Thing the Accused Can Obtain Is a Stipulated Percentage of What They Themselves May Create and Produce for Another, Because Such a Scheme Cannot Result in Pecuniary or Property Injury to the Alleged Victim.

Your Honors, in the case of *Hammerschmidt vs. U. S.*, 265 U. S. 182, (which was a prosecution under Section 37 of the Criminal Code, which punishes *conspiracies to defraud* the United States, *"IN ANY MANNER AND FOR ANY PURPOSE")* took occasion to consider the opinion in the case of *Horman vs. U. S.*, 53 C. C. A. 570, (which was a prosecution under the mail fraud statute which is involved here), and Your Honors said that the decision in the *Horman case "should be confined to pecuniary or property injury"*.

While the question was not before Your Honors for decision, Your Honors apparently drew a distinction be-

tween prosecutions under Section 37 of the Criminal Code and under Section 215, to the effect that prosecutions under Section 215, should be confined to pecuniary or property injury.[1]

Subsequently, in the case of *Fasulo vs. U. S.*, 272 U. S. 620, Your Honors cited with approval the comment on the *Horman case* that Your Honors had made in the *Hammerschmidt case.*

We, therefore, conclude, while it has never been specifically settled by Your Honors, that no prosecution will lie under the mail fraud statute, unless there is an actual or contemplated pecuniary or property injury. This conclusion is further strengthened by a consideration of the meaning of actual civil fraud, as distinguished from constructive fraud, as found in the textbooks and the jurisprudence, where one of the essentials of actual fraud is that "loss or damage must result." [2]

In this case, the only way in which pecuniary or property injury could have been inflicted or intended was by means of the contract. There was no other way in which the accused could obtain or hope to obtain money or property from the Board.

But, the only thing that could be obtained from the Board by means of the contract was 25% of whatever savings and gains would be effected, through the refund-

[1] Under the express words of the Statute there need not be an actual pecuniary or property injury and it is sufficient if such injury is intended or contemplated.

[2] Under the mail fraud statute, the fraud, i. e., the loss or damage need not result if it has been intended or contemplated, but "LOSS OR DAMAGE" must still be intended or contemplated.

ing operations, *by the defendants themselves,* through their skill and expenditures. Those savings and gains had no prior existence, either actual or probable, and were created only by the defendants. The Levee Board, before the contract was made, had no right of property in those savings and gains, which were not only not in *esse,* but which it had no reasonable hope of obtaining without the defendants. Nothing in an indictment can be taken by intendment. The indictment did not charge, and of course there was no proof offered, that the Board would or could have otherwise made any savings and gains at all, through refunding operations conducted by itself or through anyone else, or had any reasonable hope of doing so.

The Board, therefore, had no property right in the savings and gains made by the defendants through refunding operations, except the right it acquired, through the contract, to 75% thereof. If *pecuniary or property injury* was inflicted or intended, it could only be as to that 75%.

That there was no INTENTION to deprive the Board of that 75% is shown by the contract itself. The defendants could not have intended to deprive the Board of any part of that 75% when they specifically contracted in writing to give that 75% to the Board. Nor was it proven that the Board HAD BEEN fraudulently deprived of any part of that 75%. The only charge in the indictment as to that was that the savings and gains had not been computed at their present value, or under the present worth theory, and that to that extent the Board had been de-

prived of part of its 75%. But the Court of Appeals found that while the savings and gains should have been reduced to their present value at a rate of discount justly applicable, the computation made on a mathematical basis indicated only fraud or mistake in a civil proceeding, and that the Court "would hesitate, under the testimony, to uphold a criminal conviction on this alone". (Rec. Vol. 8, pp. 4821, 4822.)

If it be true, as found by the Appellate Court, that no criminal fraud was proven as to the 75% of the savings and gains that the Board acquired by the contract, then it necessarily follows that no criminal case was proven at all, because there was no intention to deprive and no actual deprivation of any money or property, within the meaning of the Mail Fraud Statute.

There was no intended pecuniary or property injury, within the meaning of ANY LAW, MUCH LESS the Mail Fraud Statute. The contract, far from intending or causing any pecuniary or property injury, was a contract by which the Board obtained a pecuniary or property benefit that it would not otherwise have obtained or been entitled to. To put it another way, there can never be pecuniary or property injury when the only thing the accused can obtain or hope to obtain is a contingent part of WHAT THEY THEMSELVES PRODUCE and bring into being, because such a scheme necessarily contemplates pecuniary or property BENEFIT to the supposed victim, and cannot possibly cause any loss or damage.

We respectfully pray that Your Honors review this case to determine whether or not any pecuniary or property

injury was intended or inflicted by the contract in this case. If it was not, the convictions should be reversed.

In further support of this petition for a writ of certiorari, we adopt, by reference for the sake of brevity, those reasons and arguments presented by the other defendants in this case who have filed separate petitions.

CONCLUSION.

We respectfully urge that the issues raised by this case are serious and important ones, involving questions of constitutional law and of construction of a Federal Statute, which the Government has sought to extend beyond the meaning of its terms, that some of these questions have never been passed upon by Your Honors, and that a writ of certiorari should issue.

Respectfully submitted,

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Nos. 910-913

In the Supreme Court of the United States

OCTOBER TERM, 1940

ABRAHAM S. STEINBERG, PETITIONER

v.

THE UNITED STATES OF AMERICA

ROBERT J. NEWMAN AND ROBERT T. HAINES, JR., PETITIONERS

v.

THE UNITED STATES OF AMERICA

HENRY J. MOLLER, PETITIONER

v.

THE UNITED STATES OF AMERICA

HERBERT W. WOLFINGER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1940

NOS. 910–913

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 4801–4822) is reported in 117 F. (2d) 110.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 18, 1941 (R. 4823), and petitions for rehearing (R. 4824–4859) were denied March 3, 1941 (R. 4860). The petitions for writs of certiorari were filed April 2, 1941.[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

Two questions are raised by all petitioners:

1. Whether a scheme to secure a contract with a Board of Levee Commissioners to conduct the refinancing of its obligations and to obtain the money of the Board as an excessive fee under the contract, employing to this end the corrupt participation of a member of the Board, the concealment of that participation, the willful misrepresentation of the savings effected and of the amount due as a fee, constitutes a scheme or artifice to defraud under the Mail Fraud Statute.

2. Whether, because of alleged extraordinary circumstances arising out of a state political campaign and the conduct of the prosecutor, petitioners were denied a fair trial.

In addition, petitioner Waguespack presents the following questions:

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[1] An "additional and supplemental petition" was filed on behalf of petitioner Harris on April 10, 1941.

3. Whether the selection pursuant to the Act of June 29, 1932, of two alternate jurors, who were excused before the case was submitted, deprived petitioner of his right to trial by a common-law jury of twelve.

4. Whether the admission in evidence of a certified copy of a federal income tax return to prove receipt of his part of the profits from the fraudulent scheme violated petitioner's constitutional rights against self-incrimination.

The petition of Newman and Harris also raises the following question:

5. Whether incriminating documents should have been excluded from evidence on the ground that they were seized by state officers under an allegedly invalid search warrant and turned over to the federal prosecutor, where it appears that the seizure was made to obtain evidence for a state court proceeding and without the knowledge or participation of the federal authorities.

Petitioner Miller also presents the following question:

6. Whether the jury should have been instructed to acquit him if they found that his participation in the fraudulent scheme charged was honestly based upon advice of counsel.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C., Title 18, Sec. 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud,

> or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States * * *, or shall knowingly cause to be delivered by mail according to the direction thereon, * * * any * * * letter * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of Louisiana on all but the fourth count of an indictment in eight counts (R. 103–130) charging violations of the Mail Fraud Statute. Each petitioner was sentenced to thirty months on each of the seven counts on which he was convicted, such sentences to run concurrently, and fined $1,000 on each of counts one and eight (R. 453–460). The Circuit Court of Appeals for the Fifth Circuit unanimously affirmed the judgments of conviction (R. 4801–4823). The case proved under the indictment may be briefly summarized as follows:

The Orleans Levee Board, an agency of the State of Louisiana, had outstanding a number of bond issues. On July 10, 1936, the Board ap-

proved a contract employing petitioners Newman and Harris, New Orleans bond dealers, as "fiscal advisers" to aid in refunding certain of these issues at lower rates of interest (R. 3032–3050). The contract provided that Newman and Harris should receive 25% of the "saving and gain" realized by the Board through the refunding (R. 3035). The bond dealers were to pay certain expenses and were to deposit 1% of the principal amount of bonds called for redemption at a given time as a guaranty of the sale of the new bonds and as compensation for any loss caused by the payment of premiums on the outstanding bonds (R. 3033–3035).

Previously, on June 11, 1936, Newman and Harris had entered into an agreement, not disclosed to the Levee Board, with petitioner Shushan. He was a former member (R. 2791) and President (R. 2796, 2812–2813) of the Levee Board and was considered influential with Governor Leche (R. 1845–1846). The agreement provided that Shushan would be an equal partner with them and that one-third of any profits realized by Shushan would be paid to petitioner Miller (R. 1215, 1216). Miller in turn made an arrangement with petitioner Waguespack, a member of the Levee Board and Chairman of its Finance Committee (R. 2803, 2839), whereby he agreed to give Waguespack 70% of any profits he might receive from Newman and Harris (R. 2144, 2155).

Waguespack participated actively in the meeting of the Levee Board which approved the contract with Newman and Harris (R. 3036–3050). He repeatedly asked Newman questions designed to bring out the advantages of the refunding proposal, made a motion for its acceptance and voted for it (R. 3050).[2] At this meeting Newman stated that he had taken up the proposal with the Governor and that he approved it (R. 3039–3040). Waguespack never disclosed his interest in the contract to any member of the Board (R. 1613, 1645, 1812, 2159). He justified his silence on the ground that the Board would unduly favor the contract if they knew he had an interest in it (R. 2159). Newman justified his failure to disclose Miller's interest to the Board on the ground that Miller was Shushan's partner and his failure to disclose Shushan's interest on the ground that the Board was not friendly to Shushan (R. 2361–2362). On other occasions Newman and Harris denied that they had any partners in the transaction (R. 1601, 2353).

Under the contract of July 10, 1936, Newman and Harris, in three transactions, caused the Levee Board to call for redemption bonds in the amount

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[2] In each refunding the necessary resolutions of the Levee Board were adopted upon motions of Waguespack (R. 3115, 3149, 3173, 3251, 3299, 3331, 3332–3337, 3356, 3383, 3391, 3398, 3399, 3400). He was similarly active in securing an extension of the Newman, Harris contract (R. 3229). His judgment was relied on by other Board members in all bond transactions (R. 1573).

of $5,485,000 and to issue new bonds at lower interest in an equivalent amount (R. 1204–1214).[3]

On October 7, 1936, Newman and Harris wrote a letter to the Levee Board explaining the method of computing "saving and gain" under the contract of July 10, 1936 (R. 3057–3060), a matter which the contract itself deliberately ignored (R. 2360–2361). The letter provided that the savings would be determined by deducting the aggregate amount of interest payable on the new bonds from the aggregate amount of interest payable on the old bonds, after making certain adjustments on account of premiums and the 1% deposit referred to above. This method was approved in a letter signed by the President Pro-Tem. of the Board (R. 245, 3061), after a stenographer had secured the approval of the Board members by telephoning (R. 1130, 1143–1145).

In bills submitted to the Board at the close of each refunding, Newman and Harris, using the method stated in their letter of October 7, 1936, computed the aggregate savings from all the refinancing to be $1,984,925.92 (R. 3423, 3474, 3524).

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[3] The bond dealers were aided by "unexpectedly favorable market conditions" (Shushan Pet. p. 5). The new bonds, in addition, were made virtually noncallable by the adoption of a call rate of 110, thus increasing the price of the bonds through the sacrifice of callability (R. 3068–3070). The use of split rates, suggested (Newman-Harris Pet. p. 8) as an innovation of Newman and Harris, was "very common" (R. 1665).

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On this basis they charged and received from the Board fees in the aggregate amount of $496,231.48 (R. 3428, 3478, 3527). After deduction of certain expenses (R. 3573), the fees were divided among petitioners as follows: Newman and Harris, $199,110.00; Shushan, $132,740.00; Miller, $19,911.00; and Waguespack, $46,459.01 (R. 3571, 3575, 3585, 3592).

Although all of the petitioners were in New Orleans, the distribution of their respective shares in the contract proceeds was effected through New York and Chicago banks. Newman and Harris paid Shusan and Miller by cashier's checks of a New York bank or by wire transfers (R. 2215, 3449, 3509, 3510, 3554–3557). Seventy percent of the share paid to Miller was in each case given by him to Waguespack in cash (R. 1944, 1947, 2008–2010, 2167–2169, 2214–2216) and was placed by Waguespack in his safety deposit box (R. 2167–2169, 214–2216).

From their gross fees Newman and Harris paid $12,340.00 to Charles S. Fitere, who was employed at a small salary by the Levee Board to keep newspaper clippings (R. 1131, 3600–3607). Shushan testified that he recommended Fitere to Newman and Harris, who wanted to employ someone in the Levee Board office to advise them about bond people coming there (R. 2043–2045, 2105). Newman stated that he and Harris employed Fitere as a spy to keep them advised of the operations of other bond houses at the Levee

Board (R. 1814, 1817). He testified that Fitere's fee was left to his sense of fair play and that he thought the amount demanded by Fitere was outrageous (R. 2386). The amounts he received were shown on the books of Newman and Harris as paid to "Fitere and others" (R. 3611, 3614, 3617).

Expert witnesses testified for the Government that, in order to determine the amounts actually saved by the Levee Board through any of the refinancing operations, it was necessary to discount such savings from the dates of prospective realization to the date of the refinancing at the rate of interest paid under the new issue, making adjustments for premiums paid on the old bonds and received on the new bonds (R. 1684–1690, 1709–1742). By this method they computed the aggregate savings of the Levee Board resulting from the refinancing to be in an amount slightly in excess of $542,000.00 (R. 1686, 1710). In all the refundings the new bonds matured at earlier dates than the old bonds; and Newman and Harris were paid upon the assumption that interest was "saved" through such shortening of maturities (R. 1699–1700). On this basis the Board might have retired all its bonds within a year and thus "save" all future interest (R. 1700). Because of the earlier maturities of the new bonds the fee paid Newman and Harris in one refunding exceeded the savings of the Board by

$96,000.00 (R. 1702). Because of the large fees paid to Newman and Harris and other expenses incident to the refinancing, the Board's cash position will until 1963 be less favorable than if there had been no refinancing (R. 1687–1689, 3647–3648).

Dealers in municipal bonds testified that the Newman, Harris contract was unique; that bankers generally give free advice to municipalities in refunding operations; and that, where they are paid, they receive a fixed fee equal to a small percentage of the face amount of the bonds (R. 1660–1678, 2238–2246, 2388–2413, 2420–2434, 2448–2460). There was testimony that bankers use the method of computation employed by Newman and Harris for the purpose of determining the lowest bid on bonds and in statements showing the benefits from refunding, but no witness knew personally of any instance in which this method had been used to compute a fee as in the present case (R. 2246, 2405–2406, 2449).

As bearing on the question of the intent of Shushan and Waguespack, evidence of the so-called O'Neil transaction was admitted solely as against these petitioners (R. 1817–1818). In April 1936 the Levee Board proposed to issue certain refunding bonds, the details of the transaction being handled by Waguespack (R. 1818–1823). A syndicate of bond dealers headed by one Donald O'Neil (R. 1819) agreed with Waguespack

that the Board would advertise 5% callable bonds, that the syndicate would bid par for the bonds, and that if the syndicate should acquire them, Waguespack would recommend to the Board that they be exchanged for 4¾% noncallable bonds, which were more valuable (R. 1823–1826). During the negotiations O'Neil was introduced by Waguespack to Shushan (R. 1824), O'Neil understanding that it was good policy to see Shushan and that if Shushan opposed a transaction with the Levee Board there would be trouble getting it through (R. 1845–1846). Upon the consummation of this transaction O'Neil paid $27,000 as a so-called "finders fee" to another firm of bond dealers, Sutherlin and Scranton (R. 1829–1830, 1836). This money was used to purchase two cashier's checks from the Republic Bank of Dallas, one payable to Shushan for $17,500, and the other payable to Waguespack for $9,500 (R. 3963–3964). Waguespack cashed his check in Dallas and put the money in his bank box in New Orleans (R. 1830–1831, 2164–2165).

The mailings alleged and admittedly proved furthered the refinancing, in some instances, and, in others, the disposition of the fees obtained.

ARGUMENT

I

The scheme alleged and proved had for its object to secure a contract with the Levee Board to con-

duct the refinancing of its obligations and to obtain the money of the Board as an excessive fee under the contract. The fraudulent means used involved the corrupt participation in the scheme of a member of the Board who was active in gaining approval for the project and payments, the concealment of that participation, the payment of large sums to an employee of the Board, supposedly to act as a "spy", the exercise of improper influence upon the Governor, and, finally, misrepresentation of the savings effected by the refinancing and of the amount due as a fee. The Circuit Court of Appeals held that such a conspiracy is "a scheme or artifice to defraud" within the meaning of the statute (R. 4807) and that the evidence sufficed to make a case for the jury as to whether there was such a scheme to defraud (R. 4821–4822).

1. Petitioners argued below that the representation as to the savings effected and the amount of the fees due was "but an honest interpretation of the contract in accord with the practice of bondholders." In reply the court said (R. 4821–4822):

> Under all the testimony the settlements thus figured seem to us so exorbitant and unreasonable as to indicate fraud or mistake in a civil proceeding. Yet we should hesitate to rest a criminal conviction for fraud on it alone. When taken, however, in connection with Waguespack's official position and conduct and the other facts we have set out to-

> gether with the rest of the evidence, which we have been unable to set forth completely and in detail, we think it was clearly a jury question whether this was a scheme to defraud, and whether each defendant was a party to it.

In reliance upon this statement in the opinion, petitioners contend that the Circuit Court of Appeals discarded the false representations as a basis for sustaining the convictions, and rested on bribery alone. The contention misconstrues the opinion. Whatever its further legal significance, Waguespack's corrupt connection with the plan, like the influence exerted by Shushan, the secret arrangement with Fitere, and the devious distribution of the proceeds serves to refute the defense that the misrepresentation of the savings effected was honestly made. Apart from its evidential significance with regard to the claim of honest mistake, the secret participation of Waguespack involved the concealment of a fact which was obviously material to the other members of the Board and in that respect presented an additional false representation. Cf. *United States* v. *Buckner,* 108 F. (2d) 921 (C. C. A. 2d), certiorari denied, 309 U. S. 669; *United States* v. *Brown,* 79 F. (2d) 321, 325 (C. C. A. 2d), certiorari denied, 296 U. S. 650; *Campbell* v. *United States,* 12 F. (2d) 873, 876 (C. C. A. 9th); see also *Rex* v. *Kylsant* [1932], 1 K. B. 442.

2. The trial court charged "that secret arrangements with a public official by which he knowingly shares in profits on contracts which he has a voice in awarding, makes such contracts fraudulent; and, whoever knowingly and wilfully receives benefits under such contracts defrauds the public body which granted them unless you find that such public official acted honestly and in good faith" (R. 2752). There was no exception to this statement in the charge, it was not assigned as error in the Circuit Court of Appeals and it is not referred to in the petitions for certiorari. If the question—whether a scheme to obtain public money by corrupting a public official constitutes a scheme to defraud—is an issue in the case, we think it clear that the issue arises only by virtue of this instruction.[4] Assuming that the validity of the instruction is open to

[4] The Circuit Court of Appeals in discussing the validity of the indictment said: "A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another or advises him, would be a scheme to defraud though no lies were told. A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public" (R. 4806). But the conclusion of the court was that the indictment alleged "a scheme to defraud by corrupting an official *and also* by misrepresentation of results achieved" (R. 4807). As we have shown above, the court did not discard the false representations as a basis for sustaining the convictions. Hence it is only in the charge of the trial court that there was an operative affirmation of the sufficiency of a scheme to corrupt, standing alone. And that statement, as we have said, petitioners did not challenge.

challenge in this Court, in spite of the absence of an objection, we do not hesitate to urge that obtaining money by the wilful corruption of a fiduciary inevitably involves a fraud within the meaning of the statute (cf. *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5th), certiorari denied, 311 U. S., pt. 1, p. xxiii), which covers a broader ground than the ancient crime of false pretenses. See Hough, J., in *Bentel* v. *United States,* 13 F. (2d) 327 (C. C. A. 2d), certiorari denied *sub nom., Amos* v. *United States,* 273 U. S. 713; L. Hand, J., in *United States* v. *Rowe,* 56 F. (2d) 747 (C. C. A. 2d), certiorari denied, 286 U. S. 554; *Knickerbocker Merchandising Co., Inc.,* v. *United States,* 13 F. (2d) 544 (C. C. A. 2d), certiorari denied, 273 U. S. 729. Indeed, the statute speaks of "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations or promises." There would be no point in the disjunctive if false representations measured the full scope of fraud.

That corruption of a fiduciary is a fraud has been held by this Court with respect to the scope of Section 37 of the Criminal Code (*Crawford* v. *United States,* 212 U. S. 183; see also, *United States* v. *Manton,* 107 F. (2d) 834 (C. C. A. 2d), certiorari denied, 309 U. S. 664) as well as in numerous cases involving the civil remedies for fraud (*United States* v. *Carter,* 217 U. S. 286; *Crocker* v. *United States,* 240 U. S. 74; *Pan American Petroleum & T. Co.* v. *United States,* 273 U. S. 456). As was said

in *Bentel* v. *United States, supra,* at p. 329: "The measure or rule for what is evidence of the ultimate fact does not change in moving from the civil to the criminal side of the court; only the necessary quantum of probative force changes." See also *Foshay* v. *United States,* 68 F. (2d) 205, 221 (C. C. A. 8th), certiorari denied, 291 U. S. 674; *United States* v. *Buckner, supra,* at 926; *United States* v. *Brown,* 79 F. (2d) 321, 325 (C. C. A. 2d), certiorari denied *sub nom., McCarthy* v. *United States,* 296 U. S. 650). Petitioners point to no authority to the contrary, under the Mail Fraud Statute. Neither *Fasulo* v. *United States,* 272 U. S. 620, involving threats—traditionally distinguishable from fraud—nor *Hammerschmidt* v. *United States,* 265 U. S. 182, involving open defiance of a federal statute under Section 37 of the Criminal Code, is remotely in point. While the question was expressly left open in *Hass* v. *United States,* 93 F. (2d) 427, 435 (C. C. A. 8th), with decision turning on another ground, we do not think it is genuinely debatable or that it would call for review by this Court in the absence of a conflict on the precise issue, which concededly does not exist.

3. From the assumptions that the trial court charged that the representation as to the savings effected was sufficient in itself for conviction, and that the Circuit Court of Appeals held to the contrary, petitioners Harris and Newman also argue (Pet. 44–49) that the jury may have based its verdict on an untenable ground, with the result that

they are entitled to a reversal under the doctrine of *Nash* v. *United States,* 229 U. S. 373. Both assumptions are unfounded. The Circuit Court of Appeals, as we have shown, did not hold the false representations insufficient; it emphasized the corruption of Waguespack as a factor supporting their sufficiency, as well as an element of importance in itself. The trial court's charge rested, in its major impact, upon the theory that the indictment as a whole alleged a scheme to defraud within the meaning of the statute. The jury was specifically instructed that in order to convict it must find that the scheme existed substantially as alleged (R. 2753, 2754, 2756, 2759), that the defendants were parties to it and that they did not act in good faith (R. 2752–2753). Nothing in the charge instructed the jury that a conviction would be proper if Waguespack's corrupt participation was not established as a part of the scheme. Given his corrupt participation, there is neither ambiguity as to the basis of conviction nor doubt that, on any theory, the scheme was one to defraud.

Nash v. *United States, supra,* is clearly not in point since there the jury was explicitly permitted to convict upon separate charges some of which had been abandoned or were insufficient in law.

4. Petitioners Newman and Harris intimate, though they do not argue, that the evidence was insufficient to show participation by them in the corruption of Waguespack. Without reciting the evidence in detail, we think it enough to say in

reply that Newman and Harris knew that a plan which permitted them to receive $496,231.00 out of the $542,000.00 actual savings to the Board, as compensation for effecting the refinancing, would, if approved, result in a palpable fraud. Since it was necessary for the proposal to be approved by the Board against its own interest, they knew as well as any of the others that the approval could be obtained only by corrupt means. They were in communication with Waguespack. They knew that he zealously advocated the scheme and carried the burden of obtaining the approval of the rest of the Board. The inescapable inference is that if they did not personally participate in making the arrangement with Waguespack, they knew that it had been made.[5] On this basis alone we think it undeniable that the evidence was sufficient to permit the jury to find that the part which Newman and Harris played in the scheme as a whole was not divorced from the corruption of Waguespack.

5. Similarly, there is no merit to the contention advanced by petitioner Harris in his supplemental petition that the use of the mails was not "in

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[5] Moreover, it was unnecessary that Newman and Harris know the precise method employed to corrupt Waguespack; it was sufficient if they knew that corruption was included in the purpose of the scheme as a whole. *Marino* v. *United States*, 91 F. (2d) 691, 696 (C. C. A. 9th), certiorari denied *sub nom. Gullo* v. *United States*, 302 U. S. 764; *Craig* v. *United States*, 81 F. (2d) 816, 822 (C. C. A. 9th), certiorari denied, 298 U. S. 690; *Busch* v. *United States*, 52 F. (2d) 79, 82 (C. C. A. 8th).

furtherance of the alleged scheme to defraud." The mailings all were related either to the refinancing itself or to secret disposition of the proceeds of the scheme. No argument is needed to show that they were made "for the purpose of executing" the scheme. The contention that they were not rests ultimately on the ground that neither the refinancing nor the receipt of the fees was a part of a scheme to defraud. That position, as we have previously shown, is unsound.

II

Petitioners assert that they were denied a fair trial because of the overruling of their motions for continuances and for a mistrial, and because of the conduct of the prosecutor, not only in prosecuting the case, but also in allegedly cooperating with certain newspapers in creating prejudicial publicity against petitioners (Newman-Harris, Pet. 49–54; Miller, Pet. 11–14; Waguespack, Pet. 21–23; Shushan, Pet. 17–38).

The rather intemperate attacks made by petitioners upon the conduct and the subjective intentions of the Assistant Attorney General in his public utterances and relations to the press are unwarranted.[6] We think it is plain, in any event,

[6] First, we wish emphatically to deny the unsupported charges (Shushan Pet. 19–20, 22–23) that some of the Government's investigations were not commenced or conducted in good faith, or that the Government prosecutors deliberately persecuted the defendants in the press. Second, it may be that the Assistant Attorney General should have been more reticent or evasive in his public statements con-

that the incidents complained of resulted in no substantial prejudice to petitioners. We can agree that the interest of the local press in the investigation and indictment was unfortunately excessive, if inevitable. But, as the court below points out (R. 4808), the matters complained of occurred prior to the trial, and the trial judge, a resident of New Orleans and personally aware of the tensions in the local atmosphere, took all necessary steps to secure an impartial jury. *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5th), certiorari denied, 311 U. S., pt. 1, p. xxiii; *Allen* v. *United States,* 4 F. (2d) 688 (C. C. A. 7th), certiorari denied *sub nom., Hunter* v. *United States,* 267 U. S. 597; *Kelly* v. *United States,* 258 Fed. 392 (C. C. A. 6th); *Lias* v. *United States,* 51 F. (2d) 215 (C. C. A. 4th); *Centoni* v. *United States,* 69 F.

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firming the common knowledge of the occasion of his presence and with respect to the subject matter of his investigations, but this raises a delicate issue of public policy which hardly can be explored in the appellate courts. It is, in any event, patently unfair to attribute to the prosecution all of the newspaper publicity in a matter of such large public interest. Third, the specific incidents shown in the record are, for the most part, easily explicable. For example, the publication of the prosecutor's photograph with bullets mailed to him anonymously with the warning to discontinue the investigation of the 1935 Shushan jury, was a normal consequence of the receipt of such a threat. The charge that he ridiculed in the press petitioners' applications for continuances (Newman-Harris Pet. 28) is grossly misleading. The article in the press was an accurate report of the proper argument of the prosecuting attorney in open court in opposing the motions for a continuance. (See Shushan Pet. 30.)

(2d) 624 (C. C. A. 9th). As this Court has said, reliance must be had upon "the learning, good sense, fairness and courage of federal trial judges". *United States* v. *Nardone,* 308 U. S. 338, 342.

The jurors were fully examined on their voir dire to determine whether they had any political connections (R. 960, 967, 973, 983), and whether they had read anything about the case in the newspapers from which they had formed opinions concerning the guilt of the defendants (R. 974, 975, 980). It is true, as petitioners state (Newman-Harris, Pet. 28), that some of the talesmen had formed opinions about the case. But they were promptly excused by the court (R. 966, 974, 992, 997, 1003). Petitioners felt required to use only seven of their ten peremptory challenges (R. 958–1013). See *Hartzell* v. *United States,* 72 F. (2d) 569, 577 (C. C. A. 8th), certiorari denied, 293 U. S. 621.

Throughout the trial, which was conducted with scrupulous fairness, the proceedings were carefully guarded in the interests of the petitioners. Though petitioners now point out that the jury was not locked up (Newman-Harris, Pet. 52), this course was presumably followed with the consent or agreement of their counsel since they failed to request that this be done. The jurors were admonished each day not to read newspaper accounts, nor listen to radio comments concerning the trial, and not to discuss the case with anyone (R. 339, 349, 357–363, 375, 1344). See *Hart* v.

United States, supra. It must be assumed that they obeyed these instructions. *United States* v. *Rice,* 195 Fed. 171 (S. D., N. Y.); *United States* v. *Rollnick,* 91 F. (2d) 911 (C. C. A. 2d); *Coplin* v. *United States,* 88 F. (2d) 652 (C. C. A. 9th).

Petitioners complain of two allegedly prejudicial matters published during the trial (Newman-Harris Pet. 28–29). The complaint is groundless in the absence of any showing that either matter was read by any juror. *Klose* v. *United States,* 49 F. (2d) 177 (C. C. A. 8th). See *Paschen* v. *United States,* 70 F. (2d) 491 (C. C. A. 7th). In the second instance, on the defendants' motion for a mistrial, the jurors were polled and each of them stated that he had not read the article (R. 1308–1310).

The statement of the Assistant Attorney General that he believed the defendants guilty (Newman-Harris Pet. 30), was improper, but it was adequately corrected by the trial judge (R. 2507); and it was only a brief incident in a long argument, which, when viewed as a whole, was entirely fair.[7] *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150.

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[7] Similarly, the petitioners Newman and Harris (Pet. 30) object that the argument of the Assistant Attorney General linked them to the O'Neill deal (R. 2572–2573). This inadvertence was not objected to and was cured by the charge which, in spite of petitioners' implication, specifically directed the jury to limit that transaction to Shushan and Waguespack (R. 2734).

Petitioners suggest that the interest of the Government would not have been prejudiced by a six weeks' continuance (Newman-Harris, Pet. 51). However, there was not only a primary election in January 1941, but a run-off election in February 1941. Certainly continuances until a "reasonable time" (Shushan, Pet. 29) after the February election would have been requested had the trial date been postponed. And "encouragement of delay is fatal to the vindication of the criminal law." *Cobbledick* v. *United States,* 309 U. S. 323, 325 (1940). The trial judge cannot be said to have abused his discretion in denying the motions.

III

Petitioner Waguespack contends (Pet. 16–20) that the selection of two alternate jurors was error and that the Act of June 29, 1932, c. 309, 47 Stat. 380, U. S. C., Title 28, Sec. 417a, violates the constitutional right to be tried by a common-law jury of twelve. Since the alternate jurors were excused prior to submission and presumably obeyed the instruction of the trial judge not to discuss the case with the other jurors (R. 339, 341, 342, 344–349, 357–363), the court below concluded that "no harm was done" and refused to examine the constitutional question (R. 4809). The decision was clearly right under the elementary rule that one who attacks a statute must show that the alleged unconstitutional feature injures him. *Heald* v. *District of Columbia,* 259 U. S. 114, 123.

There can, moreover, be no serious doubt as to the constitutionality of the statute. Nothing in the Constitution prevents a modification of the jury system so long as its essential characteristics are preserved. *United States* v. *Wood,* 299 U. S. 123, 141–147; *Patton* v. *United States,* 281 U. S. 276. Many of the states with constitutional guarantees identical with the Federal Constitution have adopted similar statutes which have in every instance been held valid. *People* v. *Peete,* 54 Cal. App. 333; *State* v. *Dalton,* 206 N. C. 507; *People* v. *Mitchell,* 266 N. Y. 15; *State* v. *Dolbow,* 117 N. J. L. 560; *Commonwealth* v. *Fugmann,* 330 Pa. 4.

IV

Petitioner Waguespack's contention (Pet. 11–16) that his constitutional rights were invaded by the introduction in evidence against him of a certified copy of his income-tax return was adequately disposed of by the court below (R. 4811–4812) on the ground that he was in no position to raise the point. As that court properly held, petitioner could avail himself of his privilege of not furnishing incriminating testimony only by refusing to furnish it at the proper time, i. e., when the tax return was filed. Cf. *United States* v. *Sullivan,* 274 U. S. 259. If not raised at the proper time, such a privilege is deemed to have been waived. *Vajtauer* v. *Comm'r of Immigration,* 273 U. S. 103, 112–113. It may be true, as petitioner points out (Waguespack pet. 14), that if he asserts the privilege by refusing to report

his income he commits a violation of the revenue laws. *Scelera sceleribus tuenda.* Having included the information in his income-tax return, there was no further privilege to preclude the use of the return or its contents against him (see ***Ryan*** v. ***Amazon Petroleum Corporation,*** 71 F. (2d) 1, 8 (C. C. A. 5th), reversed on another ground in ***Panama Refining Co.*** v. ***Ryan,*** 293 U. S. 388) and its introduction in evidence did not violate the self-incrimination provision of the Fifth Amendment. "A party is privileged from producing the evidence but not from its production." ***Johnson*** v. ***United States,*** 228 U. S. 457, 458.

V

Petitioners Newman and Harris contend (Pet. 55–60) that the trial court erred in overruling their objection to the admission in evidence of documents seized from them by state authorities pursuant to a search warrant, which they assert is illegal, issued by a Louisiana State court. The documents consisted of the contract between petitioners and the Levee District and various checks and communications pertaining thereto.[8] (See R. 1095.) As the court below observed, "they show

[8] Exhibits G–27, R. 1216, 3031; G–29, R. 3032–3036; G–32, 3060–3061; G–105–A, R. 3492–3497; G–116; R. 3513; G–119, R. 3517; G–128, R. 3528–3529; G–133–A, R. 3538–3541; G–145, R. 3555; G–147, R. 3557; G–150, R. 3561; G–153, R. 3564; G–155, R. 3566; G–156, R. 3567; G–162, R. 3600; G–163, R. 3600; G–165, R. 3608.

nothing more than Newman & Harris admit to be true" (R. 4811).

Petitioners' contention is without merit, for as the Circuit Court of Appeals held (R. 4810–4811), it is a well settled rule that in the absence of any federal cooperation, evidence obtained by state officers under an invalid search warrant is admissible in a federal prosecution. *Burdeau* v. *McDowell,* 256 U. S. 465, 475; *Weeks* v. *United States,* 232 U. S. 383, 398; *Edgemon* v. *United States,* 87 F. (2d) 13, 15 (C. C. A. 10th); *In re Milburne,* 77 F. (2d) 310, 311 (C. C. A. 2d); *Miller* v. *United States,* 50 F. (2d) 505, 507–508 (C. C. A. 3d), certiorari denied, 284 U. S. 651; *Vollmer* v. *United States,* 2 F. (2d) 551, 552 (C. C. A. 5th). See also *McGuire* v. *United States,* 273 U. S. 95, 99; *Center* v. *United States,* 267 U. S. 575.

That there was no cooperation between federal and state officers here is plain. The state district attorney testified that he filed the affidavit upon which the search warrant was issued in the course of his own independent investigation into bribery charges growing out of the refunding transaction between the Levee Board and petitioners (R. 1082–1084). The investigation was begun as a result of evidence furnished him by the State Audit Department, and, he added, the United States Attorney or any one representing him "had nothing to do with the matter at all" (R. 1082–1084, 1089). The officers who made the search similarly testified that it was not made at the request of the United

States Attorney or anyone in the employ of the federal government, and that no federal officer was present when the search was made (R. 1090–1098). An Assistant United States Attorney testified that he first learned of the search and seizure through the newspapers and that "some days after" the United States Attorney's office "became interested in finding out whether there was anything obtained as a result of the search that might help us" (R. 1098–1102, 1100). None of this testimony was contradicted by petitioners.[9]

In view of this unequivocal showing of non-cooperation between the state and federal officers, it is apparent that neither *Gambino* v. *United States,* 275 U. S. 310, nor *Sutherland* v. *United States,* 92 F. (2d) 305 (C. C. A. 4th), relied upon by petitioners, are in point, for in each of those cases there was an understanding between the state

[9] Petitioners point (Newman-Harris Pet. 56) to the general statement made by the district attorney that he had exchanged information with the United States Attorney but fail to add that he also said, "but prior to this search and seizure there was no suggestion on the part of the government that we make a search, none at all" (R. 1089). Similarly, when petitioners point to the testimony of the assistant district attorney with reference to making the papers available in connection with the present case, they fail to state that the witness had already explained, in reply to the preceding question, that his office did not advise the federal prosecutor until after the search and seizure (R. 1098). Again, they attach significance to the presence of an assistant United States Attorney in the office of the State District Attorney on the day of the seizure but ignore the emphatic testimony that this was wholly unrelated to the seizure (R. 1089).

and federal officers that the latter would prosecute on the basis of the seized evidence.

VI

Petitioner Miller complains of the refusal of the trial court to instruct the jury to acquit him if they found that he had honestly participated in the fraudulent scheme upon the advice of Wagues-pack, who was his attorney. (Miller Pet. 7–10.) But it is elementary that the advice of counsel, even if honestly followed, is merely a circumstance which the jury may consider in determining intent and good faith. See *Hersh* v. *United States,* 68 F. (2d) 799, 806 (C. C. A. 9th); *Murdock* v. *United States,* 62 F. (2d) 926, 928 (C. C. A. 7th); *Miller* v. *United States,* 277 Fed. 721, 726 (C. C. A. 4th).

Petitioner states that his proposed instruction was modeled from *Williamson* v. *United States,* 207 U. S. 425, 453, but in that case the charge stated that "no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel"—a qualification which petitioner's requested charge omits.

The general charge explicitly and adequately covered the question of good faith and protected Miller from being convicted if the jury found that his acts were innocent and committed without wrongful intent (R. 2739–2740, 2741, 2752–2753, 2756, 2760, 2761). And, in any event, it seems plain, as the court below pointed out (R. 4814),

that Waguespack acted as Miller's partner rather than as his attorney, and that any legal research he may have made was directed towards ascertaining whether he himself would violate state laws if he joined Miller's enterprise (R. 1918–1923, 1963–1964, 1968–1978, 1986).

CONCLUSION

The decision below is clearly correct, and there is neither conflict of decisions nor any question of general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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No. 910

Supreme Court of the United States

OCTOBER TERM, 1940.

ABRAHAM L. SHUSHAN, Petitioner,

versus

UNITED STATES OF AMERICA,

FIRST SUPPLEMENTAL BRIEF OF ABRAHAM L. SHUSHAN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Certain incorrect statements, which might have a very prejudicial effect against petitioner, are included in the Brief for the United States in Opposition. We desire to point out, and endeavor to correct, these statements.

1.

On page 5, the government's brief says:—

> "Previously, on June 11, 1936, Newman and Harris had entered into an agreement, not disclosed to the Levee Board, with petitioner Shushan. He was a former member (R. 2791) and President (R. 2796, 2812-2813) of the Levee Board and was considered influential with Governor Leche (R. 1845-1846)."

This is an echo of the persistent and unjustified disposition of the government attorneys to seek to link the petitioner Shushan in the case with the then governor of Louisiana, Leche. In the absence of any other evidence to connect Shushan with either (1) the alleged bribery of levee board member Waguespack, or (2) the manner of the computation, by Newman and Harris, of the fee, the two elements of fraud relied on by the prosecution, the government attorneys keep trying to tie Shushan in with some thought of undue political influence in the matter exercised by him on Leche. There is not a scrap of such proof in the record. One lone telegram, in a routine matter, long after the contract had been obtained and was being performed by Newman, Harris & Company, failed to supply, even by inference, any influencing of Leche by Shushan. Now the gratuitous statement is made in the brief: "(Shushan) was considered influential with Governor Leche", and pages 1845-1846 of the transcript are referred to. These pages embrace testimony in which neither Leche, nor any question of Shushan's influence with Leche, are even mentioned. The page reference, in such a connection, is untrue and mis-leading. The testimony, as to an opinion regarding possible power of opposition by Shushan in a Levee Board transaction, was, admittedly, of an "impression" founded on rank generality of hearsay, and should never have been allowed; but, even as admitted, it made no such reference as is here attributed to it in the government's brief.

2.

On page 11, the government's brief says:

> "During the negotiations O'Neil was introduced by Waguespack to Shushan (R. 1824), O'Neil understanding that it was good policy to

see Shushan and that if Shushan opposed a transaction with the Levee Board there would be trouble getting it through (R. 1845-1846)."

This is a more accurately stated reference to O'Neil's testimony on pages 1845-1846 of the transcript. However, it is still grossly unfair for the government to assume the truth of O'Neil's evidence, and ignore the fact that O'Neil fixed the only dates when he was in New Orleans and could have visited Shushan with Waguespack, as he described; and undisputable records proved Shushan was in New York city on one date and confined in a hospital by illness on the other date (Tr. pp. 2066, 2122 to 2128). O'Neil, for some reason, was an overly-eager government witness in purpose to link petitioner Shushan and co-defendant Waguespack together by this alleged visit, which was impossible of having happened as he testified it did happen. He was also eager to volunteer his "impression", as he testified, or his "understanding", as the government's brief calls it, of Shushan's power of opposition to a Levee Board transaction. Despite the fact that the record, as a whole, shows O'Neil's testimony was thoroughly unreliable, the government now adopts his statement as an established fact and fails to tell your Honors how his statement was otherwise completely discredited.

3.

On page 12, the government's brief says:—

"The fraudulent means used involved the corrupt participation in the scheme of a member of the Board who was active in gaining approval for the project and payments, the concealment of that participation, the payment of large sums to an employee of the Board, supposedly to act as a 'spy', the exercise of improper influence upon the

> Governor, and, finally, misrepresentation of the savings effected by the refinancing and of the amount due as a fee."

Again, the government refers to "improper influence upon the Governor" (meaning Leche), and if your Honors will read the record through, from cover to cover, you will not find the slightest proof of any influence exerted upon Governor Leche in connection with this refunding contract, certainly not by petitioner Shushan, and we know of none from the transcript by anybody else. This is a persistent fiction by the government attorneys to try to argue that Shushan had some place in the alleged fraudulent plan, since the prosecution had failed to prove his connection with either the fee computation or the alleged Waguespack bribe.

4.

On page 13, the government's brief says:—

> "Whatever its further legal significance, Waguespack's corrupt connection with the plan, like the influence exerted by Shushan, the secret arrangement with Fitere, and the devious distribution of the proceeds serves to refute the defense that the misrepresentation of the savings effected was honestly made."

Without again repeating what we have twice already said, we simply comment that there is not a scrap of evidence in the whole case that Shushan exerted any influence on anybody in connection with this refunding contract. None was shown to have been exerted on Governor Leche; he was called as a witness by the prosecution and not used. Every levee board member placed on the stand

declared that Shushan had never made the slightest approach to them on the subject.

5.

On page 23, the government's brief says:—

> "Petitioners suggest that the interest of the Government would not have been prejudiced by a six weeks' continuance (Newman-Harris, Pet. 51). However, there was not only a primary election in January 1941, but a run-off election in February 1941."

This is an unfair argument to advance. Neither Shushan, the prosecuting attorneys, or the trial judge knew, in November, 1939, when the continuance was sought, that there would be a second primary. The legal situation was determined then as it then appeared. We were asking not to be tried until men's political passions, fanned by the unholy combine between press and prosecutor for election purposes, had been given time to cool. Whether beyond a first primary, or a possible second primary, the necessity to accomplish due process to the accused should have been the paramount consideration.

CONCLUSION

We re-affirm the conclusion of our previous brief that the circumstances of the alleged bribery of Waguespack, and the manner of the fee computation of Newman and Harris, did not present a case within the intendment of the mail fraud law; that, particularly, Shushan had no complicity in either of these matters, under all of the evidence, and should have been dismissed from the case; that his conviction was obtained by public preju-

dice improperly created against him by the Assistant Attorney General, in collaboration with the newspapers, and that his trial on the eve of an election, under such conditions, lacked due process in the true meaning of that clause of the United States Constitution.

Respectfully submitted,

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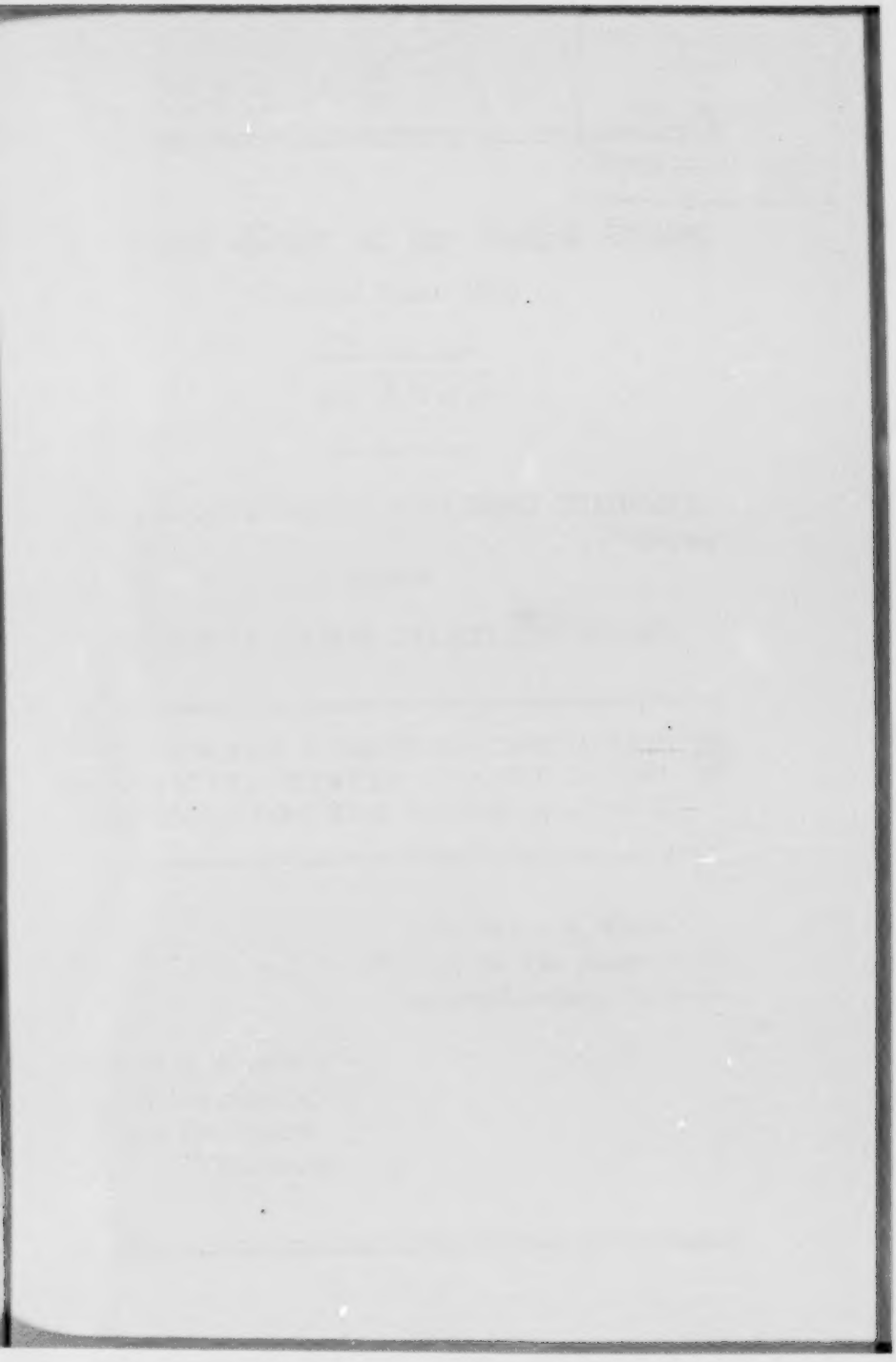

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Supreme Court of the United States

October Term, 1940

No. 911

ROBERT J. NEWMAN AND NORVIN T. HARRIS, JR.,
Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

October Term, 1940

No. .....

ROBERT J. NEWMAN and NORVIN T. HARRIS, JR.,

Petitioners,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Judgment Sought to be Reviewed

Robert J. Newman and Norvin T. Harris, Jr., by their solicitors, respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered on January 18, 1941 (8 R. 4823), rehearing denied March 3, 1941 (8 R. 4860), affirming judgments of the District Court for the Eastern District of Louisiana, New Orleans Division, entered on January 2, 1940 (1 R. 457-60), which sentence the petitioners upon a verdict returned by a jury on December 22, 1939 (1 R. 376-7).

The indictment (1 R. 103-30) in eight counts differing only in the "mailings" specified, charged the petitioners and three others—Shushan, Miller and Waguespack—with violation of the Federal mail fraud statute (Criminal Code, § 215, 18 U. S. C., § 338). All the defendants were jointly tried (but were represented by separate counsel). A verdict was returned, as to all, of not guilty under one count of the indictment, and guilty under the remaining seven counts (1 R. 376-7). The District Court imposed as to each defendant a sentence of two and a half years' imprisonment on each of the seven counts, and a fine of $1,000 under two of said counts, the imprisonments to run concurrently (1 R. 453-60).

Opinion of the Court Below

The District Court (Borah, *D. J.*), filed no opinion. The Circuit Court of Appeals, in affirming, wrote an opinion (*per* Sibley, *C. J.*) which is reported in 117 F. (2d) 110 (8 R. 4801).

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code, § 240 (a), 28 U. S. C., § 347 (a). The judgment of the Circuit Court of Appeals was entered on January 18, 1941 (8 R. 4823). Rehearing was denied on March 3, 1941 (8 R. 4860).

Questions Presented

I. Is criminal misrepresentation a necessary element in a scheme or artifice to defraud under the Federal mail fraud statute? Does the statute encompass a case where a contract is entered into in respect to which no criminal misrepresentation is made, and which is designed to and does financially benefit the counter-contracting party, but

where, in connection with the contract, a secret profit or "bribe" is paid?

II. Where a criminal case is tried and submitted to the jury on the theory that a verdict of guilty may be returned if the jury finds that the defendant committed either of two allegedly criminal acts, or both, and the jury returns a verdict of guilty, may an appellate court affirm the judgment of conviction while holding that one of the two allegedly criminal acts was not established against the defendant? Under such circumstances has the defendant received a jury trial as required by law?

III. In view of the cumulative factors of prejudice disclosed by the record herein, including the conduct of the prosecutor both prior to and during the trial, did the petitioners receive a fair trial as defined by applicable Federal standards? In this connection, was the evidence against these petitioners so "strong" or "overwhelming" as to warrant a holding that the prejudicial factors were immaterial to the conviction?

IV. Where State and Federal officials have been exchanging information and cooperating in respect to a criminal case in which a Federal indictment has been returned, and the State officials perpetrate an unconstitutional search against the accused, may documents obtained as the result of such search be offered by the Government, and received in evidence against the accused on the trial of the Federal case on the allegedly exculpating ground that the Federal officials did not actually participate in the State proceedings for the search?

Summary Statement of the Matters Involved

(A) The Indictment

Summarizing the indictment (1 R. 103-30), the Circuit Court says that it sought to charge the statutory offense by "misrepresentation of results achieved" under a contract obtained from a public body, and "by corrupting an official," presumably as a means of obtaining the contract (8 R. 4807).

The indictment alleged the following *scheme* in substance: That the Board of Levee Commissioners of the Orleans Levee District had outstanding five series of bonds aggregating about $5,500,000; that a plan of refunding these bonds was to be proposed to the Board by petitioners Newman and Harris, partners in a New Orleans bond house, which plan would include a provision to pay them 25% of the savings effected; that on actual savings of $729,000, fees of $496,000 would be charged, which would be exorbitant and excessive and far beyond the value of the services rendered; that such fees would be divided one-half to Newman and Harris, one-third to Shushan (formerly a member and president of the Board), and one-sixth to Miller (a public accountant); and that Miller would surreptitiously pay 70% of his one-sixth to Waguespack, then a member and chairman of the finance committee of the Board. Shushan, it was alleged, was corruptly to influence Governor Leche to approve the plan; Waguespack was corruptly to influence the Board to accept the plan; and money was also to be paid to one Fitere, an employee in the office of the Board, to spy and inform on what competitors in the bond business might do.

The *false representation* alleged was that the saving put forth as the basis upon which compensation was to be paid was falsely represented, in that it was figured with-

out discount back to present worth; and the Board was deprived of fair judgment in the matter by means of the corruption.

The alleged *object* of the scheme was to obtain sums of money from the Board and the taxpayers to be converted to the use of the defendants. The *mailings* alleged were principally in paying and dividing the fees.

(B) The Case in Substance as to These Petitioners *

1. Contract of July 10, 1936; Performance by Newman, Harris & Co. "with Skill and Success."

Newman, Harris & Co., a partnership composed of petitioners Newman and Harris, is a New Orleans house dealing chiefly in the purchase and sale of municipal securities. The firm had been a frequent bidder for and successful purchaser of bond issues of the Orleans Levee District; no house had been more active or more experienced in this field (3 R. 2253).

The Orleans Levee District is an agency of the State of Louisiana, embracing the City of New Orleans, the affairs of which are conducted by a Board of seven Commissioners, serving without compensation. The Levee Board constructs and maintains levees protecting the City of New Orleans and vicinity, and also maintains the New Orleans Airport and other facilities.

In July, 1936 (and for a considerable period theretofore), the finances of the District were in a difficult condition (2 R. 1360 ff.). Interest rates on the $21,000,000 of District bonds then outstanding ranged from 4¾% to 6% (see Ex. D-2, 7 R. 4010). Approximately one-half of every dollar of the Levee Board's fairly rigid income (derived almost entirely from limited taxation) was being

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* A somewhat extended statement is necessary because the Circuit Court of Appeals does not state the facts except in cursory form, and does not adequately present the position of these petitioners.

applied to bond service (2 R. 1361). In 1935 a rate of 5% was the best that could be obtained from local banks on bonds which had to be issued to fund certain outstanding indebtedness (see Ex. D-2, 7 R. 4010). District obligations had a bad reputation with investors and in financial circles (3 R. 2252). Moreover, the bond structure was uneven, the amount of principal and interest required to be paid being markedly higher in some years than in others (Ex. NH—Chart C, 8 R. 4324).

Upwards of $13,000,000 of bonds out of the total of $21,000,000 could, by their terms, be called for payment and refunded during the year following July, 1936 (Ex. G-29, 5 R. 3032). Expert advice was plainly needed (3 R. 1628).

On July 10, 1936, at a public meeting of the Levee Board, called on proper notice, at which five Commissioners and counsel to the Board were present, petitioner Newman on behalf of his firm proposed to the Board, and the Board voted unanimously to accept, a contract providing for the employment of the firm by the Board until July 15, 1937 (Ex. G-30, 5 R. 3036-50). On January 28, 1937, the contract was extended for sixty days to September 15, 1937, again upon the unanimous vote of the Board with counsel present (Ex. G-42, 5 R. 3221, 3228-9).

The contract (Ex. G-29, 5 R. 3032-6) stated that "Upon a careful study of the structure of the funded debt of your Board * * *, we feel sure that we could evolve a sound and conservative plan of revising your bonded debt that would result in a substantial saving to your Board through the lowering of interest rates of your outstanding bonds callable prior to July 15, 1937, and would also result in a great improvement of your credit * * *." During the period of employment the firm was to plan and recommend to the Board one or more refunding operations to be conducted under the supervision of the firm. All expenses of the refunding operations—whether or not completed

or successful—were to be borne by the firm: this would include legal opinions, advertisements, printing, research, etc. Upon recommending any refunding to the Board, the firm was obliged to put up a guaranty deposit of 1% of the principal amount of the issue to be called. In case any suggested refunding failed of accomplishment because no bid acceptable to the Board was received for the new issue, the firm was to forfeit the deposit; in case a bid acceptable to the Board was received and the refunding was accomplished, the firm was to receive as compensation "25 per cent of the saving and gain effected by your Board through the refunding operation," again forfeiting the 1% guaranty deposit if and to the extent that the premium paid by the purchaser of the new issue was insufficient to pay the call premium on the issue refunded. The compensation was thus purely contingent. Finally—and importantly—the contract provided that "we [Newman, Harris & Co.] bind ourselves not to bid on any of the refunding bonds offered for sale, hereby agreeing that we shall be ineligible to make a bid therefor." Thus the firm, previously very active in the field, barred itself from the profits which it had customarily made in the purchase of Levee Board bond issues (3 R. 2253).*

During the life of the contract—fourteen months—Newman, Harris & Co. devoted more than half its total time to the work (3 R. 2281), which required painstaking effort in analyzing the entire financial condition of the District, planning and conducting the refundings, guaging and discreetly developing the market, etc. (3 R. 2279 ff.).

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* The legality under Louisiana law of an employment contract for advisory services of this general nature was upheld by the Supreme Court, *State ex rel. Maestri* v. *Cave*, 193 La. 419 (7 R. 4204-22), in July, 1939, prior to the trial herein, the emphasis being upon the fact that the financial advisor, by excluding itself from bidding, has avoided any duality or inconsistency of position (7 R. 4220-1). See also the testimony of an outstanding legal expert on the same question, 4 R. 2391-2, 2410-11.

The firm recommended, conducted and concluded on behalf of the Board three notably successful refunding operations, which were authorized and approved as required by law by the Levee Board (Exs. G-36, 43, 49, 5 R. 3063, 3244, 3351) and the State Bond and Tax Board (Exs. D-5, 6, 7, 7 R. 4113-20). It recommended a further refunding which did not eventuate because high water and flood conditions destroyed the market (3 R. 2295, 1689; Ex. G-172-A, 6 R. 3648).

The three successful operations, completed in January, July and August-September, 1937, resulted, respectively, in the refunding of $1,881,000 of 5% bonds by a like amount of new bonds bearing an average interest rate of 3.58%; the refunding of $1,324,000 of 5% bonds by a like amount of new bonds bearing an average interest rate of 3.97%; and the refunding of $2,280,000 of 4¾% bonds by a like amount of new bonds bearing an average interest rate of 4.15% (Exs. G-38, 45, 51, 5 R. 3112, 3295, 3380). All the sales were public, and competition among purchasers was stimulated, certain houses coming into the field that had never done so before (3 R. 2244, 2280). "Split-rate" bids* were solicited—the first time such a method had been used in the territory (3 R. 2287). The interest rates received on the refunding issues were the lowest in the history of the Levee Board (2 R. 1338-9; see Ex. D-2, 7 R. 4010).

Although Newman, Harris & Co. was privileged under the contract to carry through the refunding of upwards of $13,000,000 of callable bonds, it limited itself to $5,485,000. While more bonds could have been refunded with profit to the Levee Board (and hence to the firm),

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* For example, the solicitation of bids on the first refunding set forth two alternative schedules of principal maturities, with provision that any rate or rates of interest not exceeding 4% might be bid upon one schedule of maturities, and any rate or rates of interest not exceeding 4½% might be bid upon the other schedule (Ex. G-38, 5 R. 3119).

petitioners felt, and stated to the Board at the time, that maximum benefit to the Board would be derived by not crowding the market (Ex. G-43, 5 R. 3244-95; 3 R. 2296).

The refundings were sound. Prior to the intervention of Newman, Harris & Co., the Board (and the taxpayers) were faced with total interest requirements of $5,474,744.17 on the $5,485,000 in principal amount of bonds involved (3 R. 1691). By means of the refundings those requirements were cut down to $3,300,212.92—a saving of $2,174,531.25 (3 R. 1692), or $1,984,925.92 if net premiums paid on called bonds are taken into account. At the same time, not only was there no increase in the principal debt, but principal maturities were so revised in relation to the whole financial condition of the District as to bring the annual outlay for debt service more nearly within the actual and anticipated income (4 R. 2314 ff.; Ex. NH—Chart C, 8 R. 4324). The position of Levee Board obligations in the market was enhanced both by comparison with past performance of District securities and by comparison with the securities of other Louisiana government entities (3 R. 2291-2).

During the trial the prosecution strenuously sought to discredit the work done by Newman, Harris & Co. under its contract of employment (*e. g.*, 3 R. 1513, 1517, 1701). Although this effort must have had ponderable effect with the jury, the Circuit Court of Appeals specifically holds that the performance by the firm under the July 10, 1936 contract was skillful and successful. The court says:

> *"The refunding, in three installments, of about half the callable bonds was accomplished within the time the contract was to run, with skill and success"* (8 R. 4817).*

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* Italics in quotations ours unless otherwise noted.

2. No Criminal "Misrepresentation of Results Achieved"

The prosecution next sought to prove that petitioners criminally defrauded the Levee Board by representing the "saving and gain" effected by the refundings to be larger than it was in fact, thereby obtaining payment of excessive compensation—this was the "principal false representation alleged" (8 R. 4806). No claim was or could be made that the Newman, Harris transactions resulted in an actual dollar loss to the Board; the only question was as to the extent of the profit.

The bills sent by Newman, Harris & Co. (Exs. G-59, 96, 124, 5 R. 3422, 3473, 3523), which were checked by the Board's auditor (2 R. 1292 ff.), paid by officers of the Board (*e. g.*, Ex. G-64, 5 R. 3428), and passed upon in the periodic audits made by the State authorities (3 R. 1542 ff.), and which remained unquestioned, so far as petitioners were aware, for two years, figured the "saving and gain" by aggregating the interest payable over the unexpired period of the old bonds and the net call premiums paid on such bonds; aggregating the interest payable on the new bonds and the premium paid by the purchasers; and striking a difference between the two. This is what is called in the record the "arithmetical" method. On this basis the net "saving and gain" effected was $1,984,925.92, on which Newman, Harris & Co. received gross compensation of $496,231.48 and net compensation of $398,220.01 (taking into account $65,750 of guaranty deposits forfeited* and out-of-pocket expenses of $32,-261.47, but not counting any part of a very substantial overhead, 3 R. 2280-1) (Ex. G-157, 6 R. 3569-73).

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* Guaranty deposits were forfeited on the three successful refundings, as well as the one abortive refunding, because the purchasers' premiums were insufficient to pay the call premiums on the old bonds.

The prosecution's theory was that "saving and gain" should have been figured by discounting savings back to "present worth," more particularly as follows (see Ex. G-172, 6 R. 3633-46):

> Set up a table of what was required yearly by way of principal and interest payments to service the old issue of bonds; set up a similar table as to the new issue of bonds; ascertain the yearly differences in amount; discount each of such yearly differences back to the date of the refunding, using as the percentage rate of discount the average rate of interest payable on the new issue; the sum of such present values (with an adjustment for premiums) represents the "saving and gain" effected.*

According to the indictment, the "present worth" of the savings was $729,000 (1 R. 108). On the trial the prosecution revised its position and said the figure was $542,366.39 or $542,552.49 (3 R. 1686, 1710). The final claim was that the gross compensation to Newman, Harris & Co. should have been one-quarter of either of the latter amounts, *i. e.*, about $135,000.

In a criminal case it would not suffice to show merely that petitioners were in error about their method of computation. Putting entirely to one side the fact that petitioners' method was accepted and acquiesced in, the very minimum required to be proved would be the deliberate use by petitioners of their method with actual knowledge that another and different method was the only just and proper one—established as a *moral* standard by general practice or by obvious and unimpeachable correctness. And the question whether the petitioners were at fault in any criminal sense turned solely on whether they had wilfully

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* This was the formula suggested by Government witness Jordan. Government witness Williams suggested a different formula which yielded somewhat different results (see Ex. G-173-A, 6 R. 3678 ff.).

misinterpreted and misapplied the following clause in the contract of July 10, 1936:

> "The total payment and compensation to be made us by your Board pursuant to this agreement shall be 25 per cent of the saving and gain effected by your Board through the refunding operation or refunding operations which may be designated by us pursuant thereto. * * *" (Ex. G-29, 5 R. 3035).*

The greater portion of the record is devoted to the question of the correct interpretation of this clause. The evidence showed:

(a) The regular practice in the bond business, and the regular practice of municipalities, is to use the "arithmetical" method in figuring interest costs incurred and savings effected through bond refundings; no other method is used (2 R. 1319 ff., 3 R. 1671, 4 R. 2394 ff.). This is the method recommended by the Investment Bankers Association of America (4 R. 2397) and employed even in finding the lowest of several "split-rate" bids, where application of the opposing theories may radically affect the results (2 R. 1324, 4 R. 2396). Practical bond men like petitioners undoubtedly think in terms of the "arithmetical" method (see 3 R. 1671).

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* In a letter dated October 7, 1936 (directly prior to the first refunding) sent by Newman, Harris & Co. to the Board, the firm defined precisely what the quoted clause meant and asked the Board to signify whether that was their understanding also (Ex. G-31, 5 R. 3057). This definition was the simple arithmetical one actually applied both in ascertaining the savings effected by the Newman, Harris refundings and in figuring the compensation to the firm. The Board signified its agreement by letter dated October 13, 1936 (Ex. G-32, 5 R. 3060), signed on behalf of the Board by President Thomas (who testified he believed the contract was "splendid," and still believes so, 3 R. 1626), after telephone communication with members,—a not unusual procedure at the Board (2 R. 1144-5). The Circuit Court of Appeals, however, excludes the October 13 letter from consideration on the ground that it did not constitute formal action of the Board. Under this ruling we are remitted to an interpretation of the contract of July 10, 1936.

(b) While apparently granting that such is the regular practice, the prosecution contended that it resulted in unfairness when used to base compensation to a financial advisor; and accountants were offered by the prosecution who analogized the problem to that of figuring the present value of money to be received by a creditor in the future (3 R. 1719), finally evolving a "present worth" formula as above set forth. Defense experts attacked this theoretical analysis by showing that, as interest liabilities are immediately written off by a municipality when a refunding occurs, the savings are presently realized (4 R. 2407), and they questioned the use, in any event, of the average interest rate payable on new bonds as the percentage discount rate in computing the so-called "present worth" (3 R. 1694 ff., 4 R. 2444).

(c) It became obvious that the real inquiry in determining the fairness of compensation based on savings was not merely as to the theory of computing savings, but also as to the rate of compensation applied to savings; for a high rate on "present worth" of savings might yield larger compensation than a low rate on "arithmetical" savings (*e. g.*, 4 R. 2412). And the question of fairness must obviously be determined not as a matter of hindsight, but in view of the probabilities and prospects at the time the employment contract was offered for acceptance to the Board. As of July 10, 1936, it was uncertain whether the Newman, Harris contract would yield a large return, a small return, or no return at all, since it was entirely contingent on prospective savings; moreover, the contract involved payment of guaranty deposits and marketing expenses, and excluded the firm from bidding, thus eliminating an important source of profits to the firm. Just prior to July 10, 1936, Newman, Harris & Co. actually made an estimate of the prospective profits under the contract. The firm's work-sheets are in evidence (Ex. NH-8a-k, 8 R. 4237-46). These work-sheets show that the 25%

rate was checked against "arithmetical" savings to be anticipated if the market remained constant. The resulting anticipated compensation was about 3% of the principal amount of the bonds (3 R. 2278). Assuming that the 25% rate was understood as applying to the "present worth" of savings, it is evident that the anticipated compensation as of July 10, 1936 would have been so low as to preclude any bond house from taking on the work. In point of fact the market did *not* remain constant; it rose substantially after July, 1936 and reached an *all-time high* in January, 1937 (3 R. 2279, 2244). But this development was not expected in July, 1936 (3 R. 2279, 2293).

(d) Finally, the prosecution's position is shown to be unrealistic *even in terms of hindsight,* after all elements of contingency and risk are eliminated. According to the prosecution's claim, the firm should have received about $135,000 as gross compensation under the contract. Against this, some $65,000 would have to be deducted for guaranty deposits forfeited, and some $32,000 for out-of-pocket expenses. The net of $70,000 (if only guaranty deposits are deducted) or of $38,000 (if guaranty deposits and out-of-pocket expenses are deducted) would each be proportionately *less* than the *minimum* compensation which Newman, Harris might justifiably have expected if the employment arrangement had been "*standard,*"—*i. e., not* dependent upon any material contingency, *not* involving forfeiture of guaranty deposits, and *not* involving the exclusion of the advisor from bidding on or dealing with the refunding bonds (see 4 R. 2451-2, 2460, 3 R. 2294). The figure $70,000 would be 1.27%, and the figure $38,000 would be .69%, of the principal amount of the bonds refunded. Compensation to Newman, Harris & Co. under a "standard" arrangement would not have fallen below 1½ or 2%; the outstanding municipal bond expert, Mr. David Wood, testified that compensation under "standard" arrangements ran between 1½ and 5% (4 R. 2403 ff.).

Thus, considered even after the event, the prosecution's theory of interpretation of the Newman, Harris contract is far from convincing; and to hold that it could establish a practical *moral* test to be applied in a *criminal* case would be little short of absurd.

On the array of evidence outlined above, the Circuit Court of Appeals could only hold, and it did hold, that no criminal "misrepresentation of results achieved" was shown (8 R. 4807, 4821-2), thus casting down the main prop of the Government's case as to these petitioners. The court does indeed state that in its opinion the questioned clause "would be construed to mean" that Newman, Harris & Co. must wait for its compensation until the savings "accrued" year by year in the future; or if compensation were recoverable presently, then the savings upon which it was based should be reduced to present value "at a rate of discount found to be justly applicable" (8 R. 4821). In this view of the contract (which is not the same as the Government's indictment theory or theory at the trial), the compensation received by Newman, Harris & Co. seems to the court so exorbitant "as to *indicate* fraud or mistake in a *civil proceeding*" (8 R. 4822); but the court holds that there was not enough in this phase of the case alone to base a verdict of criminal guilt; on this phase of the case petitioners would have been entitled to a directed verdict of acquittal.

We note here—and shall emphasize below—that the District Court, in its charge to the jury, was of an opposite opinion; for the charge (4 R. 2759) authorized the jury to bring in a verdict of guilty against these petitioners based upon a finding of criminally fraudulent misrepresentation of results achieved under the contract.

3. Alleged Complicity of These Petitioners in "Corrupting an Official."

Holding that a criminal conviction of these petitioners could not be predicated upon the alleged misrepresentation of the contract of July 10, 1936, the Circuit Court proceeds nevertheless to affirm petitioners' conviction on the crucial ground that it was a "*jury question*" whether petitioners were knowingly implicated in "corrupting an official"—the "bribe" of Waguespack, laid in the indictment and urged at the trial as the *means* by which the alleged misrepresentation was put across.

This ruling squarely presents for review—see the first Reason for the Allowance of the Writ—the question whether, following the language of the Circuit Court, "bribery" in itself, absent all "express false representations," falls within the mail statute (8 R. 4806). The Circuit Court holds that it does, stressing its "essential immorality" (8. R. 4807).

The record presents additional problems which require some elaboration of the nature of the testimony allegedly implicating these petitioners in the "bribe." (a) The Circuit Court holds that whether these petitioners were so implicated was a "jury question." Considering, however, the manner in which the trial was conducted, with the bulk of evidence as to these petitioners centered upon the alleged misrepresentation of the contract; and considering particularly the District Court's charge to the jury, which authorized a conviction *either* for criminal misrepresentation of the contract *or* for complicity in the "bribe," we submit that it is impossible to say that a jury has ever answered or purported to answer, as to these petitioners, that question which the Circuit Court now holds to be focal to the conviction. (b) The record further presents the question whether these petitioners received a fair trial. (See Part (C) of this Sum-

mary Statement.)—On both these questions it is necessary to apprehend the quality of the testimony relating to these petitioners; for if the evidence was "strong" or "overwhelming,"* the claimed errors might conceivably (although, in our opinion, erroneously) be regarded as harmless; but if the evidence was not "strong" or "overwhelming," the claimed errors must be regarded as material.

The matter of entering into an employment contract with the Orleans Levee District was first brought to petitioners' attention on June 2, 1939, during a conversation with Shushan (3 R. 2023-4, 2253), a person of means who had retired as President of the Levee Board in October, 1935 (3 R. 2019), and who was experienced in financial matters affecting that Board. Having in mind the rejection of a proposal made to the Board in 1935 by Scharff & Jones for "guaranteeing" bids on a refunding (3 R. 2255), petitioners expressed doubt whether there was any room for transactions with the Board except by public purchase of their bonds (3 R. 2254). Shushan suggested the basic pattern of an employment contract to be entered into between Newman, Harris & Co. and the Board, and a draft of a proposed employment contract on this pattern was drawn up by petitioners' attorney (3 R. 2258, Ex. NH-5, 7 R. 4201), petitioners still believing that the contract would not be acceptable in view of the Scharff & Jones experience (3 R. 2255, 4 R. 2328-9). Shushan finally suggested that Newman, Harris & Co. must exclude themselves from bidding (3 R. 2258-9). This suggestion appealed to petitioners as overcoming objections to an employment relationship with the Board (3 R. 2259-61); and, as already noted (*supra*, p. 7, note), such a provision was probably vital to the legality of the contract. The

* The words are quoted from *Berger* v. *United States*, 295 U. S. 78, 89.

draft of contract was corrected in several respects and the provision as to exclusion of bidding was inserted (see handwritten notes on Ex. NH-5, 7 R. 4201; *cf.* with Ex. G-29, 5 R. 3032). The 25% contingent compensation first mentioned by Shushan was incorporated only after Newman, Harris & Co. had independently computed what that would probably amount to (3 R. 2272 ff.). The employment contract as finally corrected and amended was offered to the Levee Board by petitioner Newman on July 10, 1936 and was then accepted by the Board, having been previously informally discussed with the Board members (3 R. 2269).

Newman, Harris & Co. and Shushan agreed to go joint-account in the venture, sharing equally the profit and loss. Before coming to terms with the firm, Shushan stated that he had a commitment to Miller (a highly reputable New Orleans accountant not known to these petitioners, 3 R. 2261), from whom Shushan said he had gotten the idea (3 R. 2257-8); and Shushan wrote Newman, Harris (Ex. G-26, 4 R. 3010) in effect stating that one-third of his one-half of the net profits was assigned to Miller. Newman, Harris & Co. and Shushan entered into a written contract (Ex. G-27, 2 R. 1216) appropriately expressing the joint-account between them and the direction by Shushan that one-third of his one-half of the net profits, if any, be paid to Miller. In fact, on receiving compensation from time to time from the Levee Board, Newman, Harris & Co. paid in strict accordance with this written agreement, retaining one-half of the net profits for themselves and disbursing one-third to Shushan and one-sixth to Miller (*e. g.*, Ex. M-1a, 8 R. 4327). The firm's records and income tax return disclose the arrangement, and the payments, in full and in meticulous detail (Exs. G-165, 157, 6 R. 3608, 3571).

It now appears—and petitioners insist they did not learn of it until the Grand Jury investigation herein—

that Miller gave a sum equal to 70% of what he received to Waguespack, a member of the Levee Board. We do not pause to consider whether such payment constituted a "bribe," since the primary question is whether these petitioners knew anything about such payment or about any Waguespack connection. Petitioner Newman on behalf of both petitioners vigorously denied all knowledge of any Waguespack connection (4 R. 2308). Miller and Waguespack testified that petitioners had no knowledge of any Waguespack connection; Shushan testified to the same effect and also denied such knowledge on his own part (3 R. 1961, 2156, 2028).

In holding it to be a jury question whether petitioners were knowingly implicated in the Waguespack "bribe," the Circuit Court of Appeals suggests the following points, which were also stressed by the Government below:*

The court says (8 R. 4816) that petitioners did not publicize that they were dividing compensation with Shushan and Miller. Petitioners answered that bond houses frequently act for undisclosed principals, partners and fellow members of syndicates; moreover they believed that Shushan was unpopular with the Board (4 R. 2361-2).

The court suggests (8 R. 4818) that Waguespack was suspiciously active at the Board meeting of July 10, 1936 and at other meetings, and Newman, Harris & Co. advised him of some details of the refinancing. But the Board minutes, which are in evidence, show throughout that Waguespack was customarily very active in Board affairs, and he had an additional interest as chairman of the finance committee. Silence on Waguespack's part would have been more suspicious than activity. Petition-

* Some reference is made in the opinion to Governor Leche, but petitioners did not even know him (3 R. 2271), and the proof certainly shows no criminal connection. The Circuit Court rests its affirmance on the alleged connection with *Waguespack*, who is called the "great stone of stumbling" (8 R. 4817).

ers say that they did not know Waguespack was in any way involved and his conduct did not seem to them extraordinary (4 R. 2363-4).

The court says (8 R. 4816) that Newman, Harris & Co. used secretive methods in banking its fees with Chicago and New York banks and in using certain cashiers' checks in making payments to Miller and Shushan. These transactions were not secretive in the sense that they left no tracks: they were fully disclosed in the firm's books and left a plenitude of documentary evidence elsewhere, particularly in the out-of-town banks with which, incidentally, the firm maintained active accounts both before and after the transactions in question (2 R. 1419, 1441). Petitioners were secretive in the sense that they left a minimum of documents in *local banks*. This, they say, was quite intentional, and was fundamentally necessary if they were to do the best job possible for the Board and correspondingly increase their own compensation. Petitioners were intent upon getting as many bidders into the field as possible; and that they did stimulate competition in all discreetly feasible ways appears from the record (see 3 R. 2299 ff.). A highly important factor in keeping the competition alive was to maintain the pretense that Newman, Harris & Co., usually a leader in the market, was active and in a position to bid; if the contrary became known, bidding by others would have been "chilled" or syndicates would have combined or agreed to eliminate competition among themselves (3 R. 2304). The local banks were potential bidders, and actually participated in the syndicates which purchased the three refunding issues covered by the Newman, Harris contract (5 R. 3134, 3306, 3390; 3 R. 2303). Therefore, care was taken not to leave with those banks documents which might contemporaneously have informed them of the Newman, Harris arrangement with the Board, and particularly of the firm's exclusion from the bidding (3 R. 2299-2304, 4 R. 2370-1). Although, as the Circuit Court observes, the contract of

July 10, 1936 was of record with the Board, in ordinary course it would not be, and in fact it appears not to have been, examined by prospective bidders (4 R. 2370).

The same motive—the firm's conception of its task as turning *against* its colleagues in the bond business to the extent necessary to produce maximum competition among them in the Levee Board refundings—accounts for a further arrangement, in part secretive, to which the Circuit Court adverts (8 R. 4820): the employment of one Fitere, a minor employee of the Board, and the payment to him of some $12,000. The payment (together with the name) is disclosed in the records of the firm as an expense of operations (Ex. G-165, 6 R. 3608-18), and receipts signed by Fitere were in the firm's files and are in evidence (Exs. G-162, 163, 164, 6 R. 3600-1). According to petitioners. Fitere was paid to spy and inform on the comings and goings of bond people—to relay to the firm information valuable to it in its capacity as advisor which was not conveniently forthcoming from the Secretary of the Board (3 R. 2296-9; 4 R. 2374-8). Fitere did relay such information (3 R. 2297). He was able to "hold up" the firm for more than he was worth. The Circuit Court intimates that the reason was that he knew the firm was doing something "very wrong" (8 R. 4820). This is surmise; there is no testimony that he knew anything "wrong." Petitioners' explanation is at least equally plausible: Fitere could exact more money than he had earned because he was—perhaps foolishly—placed in a position where he could tell bond people what the firm did not want them to know, namely, the firm's contractual relationship with the Board, and particularly its exclusion from bidding. (The further relevant facts as to Fitere are that he was hired months after July 1936, and had no access to confidential information of the Board and no possible influence with Board members or officials (2 R. 1131-2, 3 R. 1616, 1626). Fitere died before the trial.)

Unless the foregoing analysis is true, it is at least difficult to explain the undisputed fact that Newman, Harris & Co. went so far as to appear at public sales of the refunding issues bearing certified checks deliberately drawn on local banks, and giving every appearance of being interested bidders for the issues (3 R. 2301-2, 2146).

We have here singled out the phases of the evidence which are said to make a case against these petitioners. Granting that the corruption of an official would not proclaim itself, and that proof positive is not to be expected, it is still a fact that the evidence concerning these petitioners was neither "strong" nor "overwhelming" (the Circuit Court does not suggest that it was), and the question whether it excluded the hypothesis of innocence was debatable. It is fair to say, also, that the situation was such as to call for extreme care lest these petitioners be held guilty by mere *association* with other possible wrongdoers as to whom the evidence may have been regarded as more substantial. As to Miller and Waguespack, it was at least clear that the former gave and the latter took sums of money; as to these petitioners the evidence was, at worst, far removed from direct complicity in such payments. As to Shushan, evidence was admitted (whether correctly or incorrectly) called in the record the "O'Neil transaction," which tended to show that he and Waguespack had mutually participated in a deal involving Levee Board bonds just prior to the present transaction. Undoubtedly this had great effect with the jury. Concededly, however, these petitioners knew nothing about the O'Neil transaction; it was utterly irrelevant as to them (3 R. 1817-8). (This did not deter the prosecutor from prejudicially stating in his summation that petitioners did know of the O'Neil transaction; see *infra*, pp. 29-30).

District Court Charge Versus Circuit Court Ruling

Upon such proofs the Circuit Court holds that it was a "jury question" whether these two petitioners were criminally tied to the Waguespack "bribe"; this is the *vital* jury question, since the Circuit Court also holds that no other branch of the case would support a criminal conviction. And the Circuit Court necessarily *assumes* in affirming the conviction that the jury by its verdict did answer that question in the affirmative as to these petitioners.

In the second Reason for the Allowance of the Writ, we show by reference to the District Court's charge and the development of the case that this assumption was erroneous. There is thus posited the question whether, by reason of the Circuit Court's shift of theory and emphasis, these petitioners have not been deprived of the essence of a trial by jury, *i. e.*, a definite jury finding on the precise issue of criminality as framed by the court of higher authority.

(C) Prejudicial Factors Depriving These Petitioners of a Fair Trial

By motions for continuance of the trial of the case (1 R. 622, 2 R. 760, 939), applications to punish certain newspapers for contempt (1 R. 572, 578, 635, 696, 2 R. 948), objections to the conduct of the prosecutor (2 R. 1077, 3 R. 1892, 4 R. 2506, 2508, 2521, 2522, 2535, 2539, 2557), and motions to declare a mistrial (2 R. 1076, 1307, 4 R. 2500, 2508), these petitioners sought to counteract or avert the prejudice which surrounded and entered into the trial of this case. The trial judge not only failed to take appropriate corrective action but, as we submit, unwittingly precipitated further prejudice.

Petitioners' claim (8 R. 4644-7, 4703-12) that they did not receive a fair trial was rejected by the Circuit Court of Appeals, although that court conceded that the situation was extraordinary, inferentially crit-

icized the trial judge, and rather severely criticized the prosecutor (8 R. 4807-8). Within the limits of this petition we cannot do more than indicate certain features of the case which render the Circuit Court's disposition of this serious claim at least so far questionable as to call for review by this Court. The printed record and the voluminous physical exhibits (see 1 R. 564-9) disclose the factors of claimed prejudice with peculiar fullness, and reference must be had to that whole record finally to appraise the merits of petitioners' contention.

The Circuit Court correctly states that the situation was *"indeed extraordinary"* (8 R. 4808) — the court may have had in mind, among other things, a spectacle undoubtedly unusual in the administration of criminal justice in this country: the spectacle of "convict parades" in which a defendant on trial for his liberty was shown forth already pre-judged and condemned (2 R. 931-3).

The trial herein ran from December 4 to December 22, 1939. This was at the height of a political campaign which had commenced in strength during July, 1939 and continued with mounting public excitement until the holding of the Democratic primary election on January 16, 1940. The campaign was certainly among the most heated in the history of the State of Louisiana (2 R. 767-930). Without impugning the motives of those who caused the trial to be held when it was, it is fair to say that no better time could have been selected to suit the strategy of the reform faction of the Democratic Party; and, by the same token, no worse time could have been selected for the fair trial of a case so directly and, at least as far as the newspapers and politicians were concerned, so designedly tied to political considerations.

From the very outset—even prior to the handing down of the first indictment on August 21, 1939—the case was tagged in the public mind as the "Shushan Case." Construed as involving graft charges against a former officer-

holder identified with the faction in power, the case was seized upon and widely exploited as the test of the pretensions of the reform group. Having put its reliance on the "Shushan Case" as a major argument in the campaign, that group was not averse to prejudicing the case so that a verdict of guilty might be assured and its political position thus strengthened and vindicated.

Petitioners Newman and Harris were not public figures and had never cast themselves into the political arena. They were, however, promptly associated with Shushan and became ciphers in a vast political war not of their own making.

From the time when the "Shushan Case" first broke in the press (*New Orleans Times-Picayune,* July 29, 1939) all four principal newspapers in the City inaugurated, and pursued until the end of December, a systematic and sustained attack on Shushan and his alleged confederates as archetypes of that corruption which the reform group desired to root out of the community. An indication of the violence of the attack is given by the fact that one of the newspapers could unabashedly publish as early as August 4, 1939 (*New Orleans States*) a letter from a correspondent suggesting "a few oldfashioned necktie parties" if prosecutions did not prove "sufficient." The scare headlines, *ex parte* news articles, inflammatory editorials and cartoons and caricatures are collated as physical exhibits herein. Like appeals to passion were made over the radio and at huge political mass-meetings (see 2 R. 931-2).

That the outcome of the "Shushan Case" was an issue in the campaign is exemplified by the practice of the *Times-Picayune* and the *States* in publishing regularly a two-column box entitled "Summation of State Situation" in which the case and the names of these petitioners figured. With an interruption, hereinafter noted, this "Summation" appeared continually from late July until the end

of December. One of the candidates for Governor had on exhibition at his political headquarters a picture representing Shushan ("I tried to fix de jury"), among others, in prison stripes (2 R. 932); the same candidate went further and staged parades of men in convict garb, one of them carrying a placard labeled: "Shushan" (2 R. 933). Such parades continued during the trial herein, and there is at least an interesting possibility that members of the jury (who were not sequestered) observed one or more of such torchlight processions in which a defendant on trial before them appeared with a pre-verdict of guilty. Another candidate for Governor spoke of "jail-bound birds" (*Times-Picayune,* November 13); he claimed personal credit for having made the appeal to Washington which resulted in the intervention of the Federal Government in the person of the prosecutor herein, Mr. O. John Rogge, Assistant Attorney General (*Times-Picayune,* November 9).

The Circuit Court correctly states that Mr. Rogge's "encouragement of the newspaper publicity about the case was ill-judged, and improper"; also that he "contributed to what became an abuse" (8 R. 4808). In late July the Assistant Attorney General established himself in New Orleans, having previously announced in the press his impending clean-up campaign (*Times-Picayune,* July 26). He made public speeches describing the purpose of his visit (*States,* August 8). From time to time he gave interviews and made "official announcements" to the newspapers concerning the nature of the matters then under consideration by the Federal Grand Jury and other investigating agencies. He specifically prejudiced the "Shushan Case" by announcing—both before and after the indictments herein—that the Grand Jury was investigating "jury tampering" and "perjury" in connection with the trial and acquittal of Shushan in 1935 on charges of income tax evasion (*e. g., Times-Picayune,* August 12; *Tribune,* August 12; *Item,* November 25; *States,* August

10, November 24); and on one occasion he had himself photographed with bullets sent to him in an anonymous letter threatening his life if he went forward with the Shushan jury-tampering investigation (*Tribune,* August 15; *States,* August 14). Nothing came of this alleged Grand Jury investigation; but the obvious, if unintended, result of the repeated announcements by the Assistant Attorney General concerning it, was to conjure up for the veniremen in the present case the prospect of a similar inquiry into their conduct in the event they acquitted the defendants. Not only, then, did the prosecutor fail to dampen the ardor of the press and the public; he joined hands with them in stimulating the excitement.

Of a piece with these prejudicial activities was the prosecution's behavior in connection with the sensational seizure by State officials of documents of Newman, Harris & Co. two days after the return of the first Federal indictment. This matter is described in detail in the fourth Reason for the Allowance of the Writ, where it is contended that the use of the seized documents by the prosecution at the trial herein violated the constitutional rights of these petitioners.

Following the return of the indictments and after the case was actually in the lap of the court, the barrage of damaging publicity continued, although the plainest principles of fair play required that the defendants, already pre-judged in the public mind, should not be further prejudiced. Thus a cartoon in the *Times-Picayune* of November 1 depicted petitioners Newman and Harris in association with fifteen political persons with whom they had never had any connection, all branded "crooks." And thus, on November 20, after the petitioners had actually been arraigned, the *Item* in effect demanded convictions of all then indicted persons, saying, "Indictments and convictions undoubtedly influence voters in casting their ballots."

On being called for arraignment petitioners applied for a continuance of the trial from December 4 until after the primary election set for January 16 (1 R. 622).* They joined with the other defendants in a petition for a rule requiring the owners and publishers of the four newspapers to show cause why they should not be held in contempt of court—a means to stem the tide (1 R. 572). Affidavits of more than one hundred local residents testifying that a fair trial could not be had (2 R. 767-930), and volumes of current newspaper material, were submitted. The applications for continuance and for a rule in contempt were supplemented and renewed on November 17 and again on November 22 (1 R. 635, 696). On the latter date the court was asked whether any judicial action on the original and supplemental petition for a rule might be expected. The court replied that it "had not read the petitions as yet" (1 R. 700). Counsel inquired if it would be possible for the court to indicate when some action might be taken. The court replied, "No" (*id.*). The prosecutor ridiculed in the press the applications for a continuance (*States,* November 7). The net effect of the almost disdainful reception of defendants' applications by court and prosecutor was the renewed publication of the "Summation of State Situation," which had been abandoned after applications for the rule were filed.

The trial began on December 4—renewed motions for continuance being denied (2 R. 947-8)—with the court declining to allow specific questions to talesmen on their reaction to the newspaper publicity, etc. (2 R. 1008, 1011). Even so, seven talesmen indicated that their minds were made up. On December 5 the *Tribune* printed a false

* There is no statutory provision for removal of a criminal case from one Federal District to another. Removal from one Division to another of the same District is possible, but would not have been of help in the case at bar.

and prejudicial headline. At the opening of court, the offending publication was shown to the judge and defense counsel moved to declare a mistrial (2 R. 1076). The motion was peremptorily denied without even a question to the jury as to whether they had seen the issue or heard it hawked about (2 R. 1077). Two days later another false and prejudicial headline was printed by the *Item*. Defendants again moved for a mistrial (2 R. 1307). This time there was a poll of the jurors; they said they had not seen that headline, although one of the jurors later informed the court that he was obliged to read newspapers in order to keep abreast of his business affairs (2 R. 1343). The court directed the prosecutor to institute contempt proceedings based on the publications of December 5 and December 7 (2 R. 1310), but at the same time denied the motion for a mistrial (*id.*). In fact the responsible persons were adjudged in contempt on December 14 and were fined (8 R. 4389, 4415). The show of indignation on the part of the United States Attorney in the proceedings for contempt (8 R. 4364) contrasts strangely with the attitude assumed toward the defendants on trial.

In the very trial of the case the prosecutor went to extraordinary lengths—even to the extent of distorting testimony—in order to convict *all* the defendants. He was perhaps *most* unfair in regard to *these petitioners* because of a subconscious feeling that his case against them was weakest. It will be recalled that highly damaging evidence was admitted, called the "O'Neil transaction," as against Shushan and Waguespack, but *not* as against petitioners Newman and Harris. After making a series of subtle attempts to intermingle the O'Neil transaction with testimony relating to these petitioners (see 2 R. 1315, 3 R. 1885), the prosecutor, in summing up to the jury, let out all the stops and directly stated that petitioners Newman and Harris "were together with" Shushan and Waguespack in the O'Neil transaction. A more hurtful distortion

of the evidence could not be imagined. The Assistant Attorney General said (4 R. 2572-3; see also 4 R. 2535-6):

> "The defendants, Newman and Harris, say they did not know that Waguespack was in on the cut, and the defendant Miller says the reason why he did not tell Shushan about Waguespack was accidental.
>
> "Not only was Shushan and Waguespack in the O'Neil deal, but the defendants Newman and Harris were together with them in that deal, and yet in spite of all those deals, with these defendants, arranging four pay-offs, three big ones and one little one, they would have you believe the defendants, Newman and Harris, and Shushan did not know about Waguespack."

A charge specifically contradicting this erroneous statement as to petitioners Newman and Harris, which might in some measure have overcome the prejudice, was refused by the court (4 R. 2784).

To cap the climax, the Assistant Attorney General vehemently declared his personal belief in the guilt of all the defendants as follows (4 R. 2506):

> "I shall try to speak to you with restraint, but I shall also speak to you with feeling and indignation, because I think that all five defendants in this case are guilty as charged in this mail-fraud indictment in all eight counts."

There was an objection (4 R. 2506). Without waiting for the court to rule, the Assistant Attorney General said (4 R. 2506):

> "I wouldn't be here if I didn't think they were guilty, if the Court please."

The court's response to the objection was (4 R. 2507):

> "Well, gentlemen, the Court does not think that any attorney ought to really inject his own personality into the case. The Government is prosecuting the case and the Assistant Attorney General is before you. You

> may draw your own inferences from that, but I ask you to disregard the personal opinion as expressed by Mr. Rogge, because that is not evidence in the case but is only his own view of the matter."

Thus, the fact that it was the Assistant Attorney General of the United States, and not an ordinary United States Attorney, who had expressed the opinion of guilt, was forcefully suggested to the jury, and they were invited to "draw your own inferences from that."

The Circuit Court does not specifically advert to these portions of the summation, and its opinion may leave the impression that Mr. Rogge's statements were provoked by equally vehement summation on the part of defense counsel. The fact is that Mr. Rogge, leading for the Government, made the first summation. His declaration of belief in the guilt of all the accused came in the second paragraph of his address (4 R. 2506).

Specification of Error

The Circuit Court of Appeals erred in affirming the judgments of conviction as to these petitioners, and in failing either to reverse said judgments and order the indictment dismissed, or to reverse said judgments and order a new trial.

Statute Involved

The mail fraud statute (Criminal Code, § 215, 18 U. S. C., § 338, as amended) provides in part as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * *"

Reasons Relied On for the Allowance of the Writ

I. In holding that participation by petitioners in a breach of trust or "bribery" was sufficient, in the absence of any criminal misrepresentation, to constitute a scheme or artifice to defraud within the purview of the mail fraud statute, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided that question in a way probably in conflict with decisions of this Court, of other Circuit Courts of Appeals, and of decisions of the same Circuit.*

The purport of the Government's case, as evidenced by the indictment and proof adduced, was that petitioners engaged in a prohibited scheme or artifice to defraud by false representations with respect to the "saving and gain" under the contract with the Levee Board, and through such false representations obtained excessive and exorbitant fees from the Board and converted these moneys to their own use. The Government regarded the false representations as the primary element of the crime and the Circuit Court stated, "The principal false representation alleged is as to the savings made under the contract" (8 R. 4806). The "bribery" of Waguespack to betray his fiduciary duties to the Board was alleged and sought to be proved as the dishonest means employed in obtaining the contract and thereby accomplishing the fraudulent scheme.

As shown in the Summary Statement, the Circuit Court found that there was no criminal misrepresentation; it nevertheless ruled that the corruption of a public official as the means of obtaining the contract constituted a scheme or artifice to defraud within the meaning of the mail fraud statute. Criminality was predicated upon the existence of a scheme which was dishonest, essentially "immoral," or

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* The question is raised and preserved at 3 R. 1898-9, 4 R. 2489, 8 R. 4648, 4649.

"inconsistent with moral uprightness." The court said (8 R. 4806-7):

> "But there may be a scheme to defraud by other means than express false representations. A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another or advises him, would be a scheme to defraud *though no lies were told.* A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public. * * * No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud. The *essential immorality* of an arrangement of that sort, or even the use of undue personal influence, is illustrated in *Oscanyan* v. *Winchester Arms Co.*, 103 U. S. 261; *Crocker* v. *United States*, 240 U. S. 74; *Crawford* v. *United States*, 212 U. S. 183; *United States* v. *Carter*, 217 U. S. 286; *Pan American Petroleum Co.* v. *United States*, 273 U. S. 456, 500."

(It is noteworthy that none of the authorities cited is a mail fraud case.)

It is, of course, indisputable that participation in a breach of trust, corruption or bribery is essentially immoral and reprehensible. The issue, however, is whether such acts are within the Federal jurisdiction under a particular statute—bearing in mind that there are no common law crimes or "constructive offenses" against the United States (*United States* v. *Eaton*, 144 U. S. 677; *United States* v. *Resnick*, 299 U. S. 207, 210), and that "one may not be punished for crime against the United States unless the facts shown plainly and unmistakably constitute an offense within the meaning of an act of Congress." *Donnelley* v. *United States*, 276 U. S. 505, 511. These canons of construction and policy are applicable to alleged offenses

under the mail fraud statute. *Fasulo* v. *United States*, 272 U. S. 620.

The implications of the present decision, which goes beyond the verge of existing law, are of vital significance. If corruption of those in a position of trust becomes a Federal offense where a letter is sent, "though no lies were told," the field of Federal jurisdiction is expanded far beyond the bounds hitherto conceived and applied as marking the limits of the statute, and, it is submitted, beyond the intent of Congress. There would be included under the vague tests enunciated by the Circuit Court—"essential immorality" or "a purpose to do wrong which is inconsistent with moral uprightness"—a variety of offenses, of which commercial "bribery" is but one instance, always regarded as peculiarly within the criminal jurisdiction of the States. Indeed, the mail fraud statute would burst over into the field of civil law and render criminal many cases never before regarded as criminal under Federal or State law,—cases of breaches of trust committed by executors, guardians, trustees or other fiduciaries where there is a concealment of adverse interest and secret profits are made, whether or not the trust is in fact injured. Derelictions such as those condemned by courts of equity in *Meinhard* v. *Salmon*, 249 N. Y. 458, would become Federal offenses. Even if the decision below is limited to the "bribery" of public officials, Federal supervision is expanded to cover every county board and municipal council in the land.

The condition of existing law must be described in order to envisage the scope and importance of the Circuit Court's departure.

(A) The crime denounced by the statute is a "scheme or artifice to defraud," or, as it is otherwise described by the statute, "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Both phrases are intended to describe the same

offense and are generally alleged in the same count (see indictment, 1 R. 104). As this Court stated in *United States* v. *Stever,* 222 U. S. 167, 173, "it would require very subtle distinction to conceive of a use of the mail to promote a scheme to obtain property or money by means of false pretenses which would not also be a 'scheme or artifice to defraud' within the plain meaning of Section 5480" (of the Revised Statutes, the predecessor of present Section 215). See also *United States* v. *Young,* 232 U. S. 155.

In his charge to the jury the District Judge recognized that no distinction existed (4 R. 2751). And the Circuit Court, in an earlier decision (*Livezey* v. *United States,* 279 Fed. 496, 498-9 [1922], *cert. den.,* 260 U. S. 721), expressly overruled the contention that an indictment alleging false pretenses and a scheme to defraud was duplicitous, stating: "We do not think the objection is tenable. It is not pointed out in argument that there is a difference between a scheme to defraud and one to obtain money by false and fraudulent representations, and we are unable to perceive any." The same ruling was made by that court last year in *Morris* v. *United States,* 112 F. (2d) 522, 526 (C. C. A. 5), *cert. den.,* ..... U. S. ....., 85 L. Ed. 61. To the same effect, see *Hass* v. *United States,* 93 F. (2d) 427 (C. C. A. 8).

The scheme or artifice denounced by the statute is, indeed, an old concept whose meaning and scope are fairly well defined. The basic element is the existence of a misrepresentation of a past or present fact or a promise known to be false when made: what is aimed at is "a cheat by means of lies." *Bentel* v. *United States,* 13 F. (2d) 327, 329 (C. C. A. 2), *cert. den.,* 273 U. S. 713. "When the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces." *United States* v. *New South Farm & Home Co.,* 241 U. S.

64, 70; *Durland* v. *United States,* 161 U. S. 306, 313; *Hammerschmidt* v. *United States,* 265 U. S. 182; *United States* v. *Stever, supra; West* v. *United States,* 68 F. (2d) 96 (C. C. A. 10); *Lewis* v. *United States,* 38 F. (2d) 406 (C. C. A. 9); *Cowl* v. *United States,* 35 F. (2d) 794 (C. C. A. 8); *United States* v. *Dilliard,* 101 F. (2d) 829 (C. C. A. 2), *cert. den.,* 306 U. S. 635.

A further and independently essential element of the crime is the purpose or intent to deprive another of his money or property; otherwise stated, the objective of the scheme must be to obtain money or property, the misrepresentations being the means to attain the result. Thus in *Hammerschmidt* v. *United States, supra,* this Court specifically referred to "pecuniary or property injury inflicted by a scheme to use the mails for the purpose" (265 U. S., p. 189). See also *United States* v. *Comyns,* 248 U. S. 349.

These criteria, established by the cases, conform to the manifest purpose of the enactment. Besides striking at counterfeiting and lottery enterprises (specifically enumerated in the text of Section 215), the statute is aimed at utilizing the mails for obtaining money from the ignorant or unsuspecting by false blandishments or "the allurement of a specious and glittering promise." *Durland* v. *United States, supra,* p. 314; *Etheredge* v. *United States,* 186 Fed. 434 (C. C. A. 5); Letter of the Solicitor of the Post Office Department, Sen. Misc. Doc. #57, 39th Cong., 1st Sess. (1866); Letter from the Postmaster General, H. Rep. Exec. Doc. #22, 46th Cong., 2d Sess. (1890).

The great bulk of cases prosecuted under the mail fraud statutes have involved the garden variety type of swindling of money or property by false representations or promises.

(B) The foregoing definition of the offense was emphasized and reiterated by this Court when attempts were made—sanctioned by lower courts in several instances—to use the statute to punish acts which, although not involving the use of false representations as a means of

obtaining money or property, were dishonest or immoral or constituted other substantive offenses cognizable by the States. The development of the law in these instances reveals a determination on the part of this and other courts to confine the statute to schemes for obtaining property by false representations, and not to permit its use as a catch-all of vague circumference. Dishonesty or "essential immorality," accepted by the court below as a test of criminality, has several times been rejected as beyond the letter and intent of the statute.

In *Horman* v. *United States,* 116 Fed. 350 (1902), *cert. den.,* 187 U. S. 641, the Sixth Circuit Court of Appeals held that a plan to extort money from a person by threats fell within the predecessor statute. The court took the position that a "scheme or artifice to defraud" was not limited in its meaning to deception or false pretenses but included any dishonest scheme calculated to deprive one of his money or property. The court's conception of the extensive scope of the crime is found in its quotation from the American and English Encyclopedia of Law (116 Fed., p. 354):

> " 'To defraud implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another.' "

The Seventh Circuit Court of Appeals reached an opposite result in *Naponiello* v. *United States,* 291 Fed. 1008, 1010 (1923), *dism.,* 267 U. S. 577, saying:

> "We agree that obtaining money through the intimidating influence of threats is a more heinous crime than obtaining money through deception, but threats which the victim believes will be carried into execution unless he acquiesces in the demands are not deceits."

In *Hammerschmidt* v. *United States, supra* (1924), this Court in effect disapproved of the *Horman* decision, saying that it went to the "verge" of the law. Mr. Chief Justice TAFT pointed out that the scope of the mail fraud statute had, since the *Horman* case, been clarified by adding to the words "scheme or artifice to defraud," as they appeared in the statute, the descriptive clause "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 35 Stat. 1130 (1909). Thus, in this Court's view, artifice to defraud signifies deception or cheating, and does not extend to schemes involving such offenses as extortion, thefts by violence, robbery or burglary.

The *Horman* case having been subsequently followed by the Ninth Circuit in *Lupipparu* v. *United States,* 5 F. (2d) 504 (1925), and *Fasulo* v. *United States,* 7 F. (2d) 961 (1925), this Court granted certiorari in the latter case. The decision of this Court (272 U. S. 620) made it altogether clear that deceit or misrepresentation was an integral part of a scheme or artifice to defraud and consequently that the use of the mails for the purpose of obtaining money by means of threats of murder or bodily harm was not within the statute.

This Court summarized the Government's position as follows (p. 626):

> "The government insists that in a broad sense threats constitute fraud, and that the section covers the obtaining of money or property of another *by dishonest means.*"

This very contention was adopted by the court below in affirming the conviction of the petitioners herein. It was, however, unequivocally rejected by this Court (pp. 628-9):

> "Undoubtedly the obtaining of money by threats to injure or kill is more reprehensible than cheat, trick or false pretenses; but that is not enough to require the court to hold that a scheme based on such threats is one to defraud within § 215. * * *

"* * * A comprehensive definition of 'scheme or artifice to defraud' need not be undertaken. The phrase is a broad one and extends to a great variety of transactions. But broad as are the words 'to defraud,' they do not include threat and coercion through fear or force. The rule laid down in the *Horman* case includes every scheme that in its necessary consequences is calculated to injure another or to deprive him of his property wrongfully. That statement goes beyond the meaning that justly may be attributed to the language used. The purpose of the conspirators was to compel action in accordance with their demand. The attempt was by intimidation and not by anything in the nature of deceit or fraud as known to the law or as generally understood. The words of the act suggest no intention to include the obtaining of money by threats. There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

See also, *Norton* v. *United States,* 92 F. (2d) 753 (C. C. A. 9).

Illustrative instances of the refusal of the courts to sustain convictions under the mail fraud statute where the plan, though immoral, dishonest or criminal, lacked the essential elements of a scheme to defraud, are *Stockton* v. *United States,* 205 Fed. 462 (C. C. A. 7), where a scheme to sell loaded dice, intended for use in cheating third persons, was held not within the statute since the dice were accurately described and not misrepresented; and *United States* v. *Smith,* 29 F. (2d) 926 (D. Neb.), where a scheme to conceal an embezzlement was held not within the statute, as the false representations, though made, were not designed to obtain money, but to conceal its theft. The remarks of the court in the latter case on the attempt by Federal prosecutors to invoke the mail fraud statute as a catch-all, thereby invading the province of the States, are suggestive (see pp. 928-9).

The criteria of criminality advanced by the court below are at variance with those set forth in an earlier opinion of the same court in *Etheredge* v. *United States,* 186 Fed. 434 (C. C. A. 5), which held that the statute did not include all types of dishonest, immoral or fraudulent schemes but was limited to frauds involving false representations as a means of obtaining money or property,—"Beyond this, the statute did not intend to go" (p. 441).

(C) Viewed in the light of the standards set forth in the foregoing decisions, the instant case raises a serious question of the applicability of the mail fraud statute.

Reduced to its essentials, there is absent in this case the elements of a scheme or artifice to defraud, as that term has been traditionally understood. The Circuit Court negatived the existence of criminally false representations; and it conceded the skillful performance of the contract and a pecuniary gain—not a loss—to the Board. There is involved, at most, a breach of trust, or the offense of bribery which is punishable by State law.*

A novel question is presented whether the failure to disclose a bribe or the adverse interest of a fiduciary constitutes a misrepresentation by silence falling within the statute. This question has never been decided so far as we have been able to find. It was posited but left unanswered in the recent decision of the Eighth Circuit Court of Appeals in *Hass* v. *United States,* 93 F. (2d) 427 (1938), which is strikingly similar to the case at bar. There the indictment alleged in substance that defendants, some of whom were officers of a fraternal benefit society known as Modern Brotherhood of America, proposed to the delegates of the society that it be merged with the Independent Order of Foresters, representing that the purpose of the

* It is, moreover, highly questionable whether the "mailings" proved were in execution of the scheme as required by the statute, and particularly of the scheme as now envisaged by the Circuit Court.

merger was to safeguard the interests of Modern and also that they would receive no money from the merger other than the salaries which they had previously received. It was alleged that these representations were false in that the defendant officers, in addition to their salaries, were to receive $300,000 from the Foresters for effecting the merger, and that the purpose of the merger was not to protect and safeguard the interests of Modern. At the trial it appeared that the defendant Parks, a broker, had entered into an agreement with the Foresters whereby he was to receive $750,000 for effecting a merger with Modern, and that he agreed with the other defendants, officers of Modern, to give them a portion of this fee upon completion of the merger. Although the defendant officers concealed the arrangement for secret profit from the members of Modern, the court found that they had not made misrepresentations as alleged; for it appeared that, because of the precarious financial condition of Modern, the merger was for its benefit and in order to safeguard and protect its interests; and it was not established that the defendant officers had stated that they were receiving no other compensation as a result of the merger. Defendants were convicted and an appeal was taken. The Circuit Court, after passing upon the validity of the indictment,* reversed the judgment, holding that the scheme established at the trial was fundamentally different from the one alleged,—which was also the situation in the case at bar and should in itself have required a reversal herein. On this point there is an unmistakable conflict between the *Hass* case and the present case. Said the court (p. 435):

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* The court held, in line with decisions above discussed, that an indictment alleging a scheme to defraud and for obtaining money by false representations was not duplicitous; the scheme to defraud and for obtaining money, etc., was a single offense. The decision of this Court in *United States* v. *Stever, supra*, and that of the Fifth Circuit in *Livezey* v. *United States, supra*, were cited as supporting authorities.

> "* * * Thus, while charging a scheme to obtain, by means of certain false pretenses, a secret profit from the Foresters and its members as they should exist after merger, the government succeeded in proving a scheme whereby the defendants other than Parks were to obtain, by concealment of facts which they were obligated to disclose, a secret profit from Parks upon completion of the merger."

The question whether the breach of trust and concealment of secret profit constituted an offense within the Federal jurisdiction under the mail fraud statute was expressly left open, the court stating (p. 435):

> "Whether the breach of trust of which the defendants who were officers of the Modern Brotherhood were clearly guilty in concealing what it was their duty to disclose, thereby obtaining for themselves money from Parks which the law would not permit them to convert to their own use, would be a scheme or artifice to defraud under section 215, Criminal Code, 18 U. S. C. A. § 338, provided the mails were used in executing or attempting to execute the scheme, it is not necessary to determine, since the scheme which was proved was not, in any event, the scheme which the government alleged in the indictment."

No other authority so far as we know has addressed itself to this basic question. Five cases were cited by the Circuit Court below, but, as already noted, none involved the mail fraud statute. Four* were civil actions in which the courts refused to enforce or granted rescission of contracts obtained by bribery or by breach of trust. Their inapplicability is manifest. The fifth, *Crawford* v. *United States*, 212 U. S. 183, involved a criminal conviction for defrauding the United States under a different statute

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* *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261; *Crocker* v. *United States*, 240 U. S. 74; *United States* v. *Carter*, 217 U. S. 286; *Pan American Petroleum & T. Co.* v. *United States*, 273 U. S. 456.

(Rev. Stat., § 5440, predecessor of Criminal Code, § 37, 18 U. S. C., § 88), whose language is much broader than that of Section 215. The statute involved prohibits conspiracies "to defraud the United States *in any manner or for any purpose.*" The mail fraud statute, particularly through the amendment of 1909, clearly limits schemes to defraud to those for "obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Hammerschmidt* v. *United States, supra.* It should be noted that this Court, in the *Crawford* case, in fact reversed the conviction.

Other authorities which have been suggested as supporting the position of the court below do not pass upon the issue. In *United States* v. *Buckner,* 108 F. (2d) 921 (C. C. A. 2), *cert. den.,* 309 U. S. 699, notwithstanding some general language in the opinion, the court actually found that the scheme was to defraud bondholders of their money by misrepresentations. As the court said, the falsehoods consisted of sending letters to the bondholders relating to contributions "under the false pretense that they were to be expended solely for committee purposes" and "intent to misappropriate at this time could clearly have been inferred" (p. 926). *Campbell* v. *United States,* 12 F. (2d) 873 (C. C. A. 9), *cert. den.,* 273 U. S. 722, and *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5), *cert. den.,* ..... U. S. ....., 85 L. Ed. 75, also involved actual misrepresentations. *United States* v. *Manton,* 107 F. (2d) 834, *cert. den.,* 309 U. S. 664, like the *Crawford* case, involved the broad conspiracy statute (Criminal Code, § 37). It has no bearing upon the construction of Section 215, a substantially different and more limited statute.

In sum: The ruling of the Circuit Court herein, in eliminating the necessity for false representations or the design to inflict a property damage, and in predicating criminality upon the "essential immorality" of a breach of trust or corruption of a fiduciary through "bribery"

or otherwise, appears to conflict with the decisions and policy position of this Court in such cases as *Hammerschmidt* and *Fasulo*.

Breach of trust and "bribery" are historical concepts distinct from the kinds of cheats by use of lies hitherto conceived as falling within the mail fraud statute.

The present case represents the first or second instance in the history of the statute in which it was sought to be used to punish breach of trust or "bribery." The well-known origin and purpose of the statute, together with its commonplace use, suggest that we are here faced with an important departure.

The consequences of the departure are striking, as already indicated. The extension of Federal jurisdiction in crimes raises the danger of debilitating the State processes. And the vagueness of the standard here sanctioned—"essential immorality" (as opposed to the traditional category of false representation)—should give pause to those concerned with maintaining the criminal law as a definite system, whose limits can be reasonably predicted, and which is not capable of subversion to *ad hoc* purposes or influences.

II. In affirming petitioners' conviction upon a finding of fact not necessarily made by the jury, the Circuit Court of Appeals has decided a question of Federal law in a way probably in conflict with applicable decisions of this Court.*

The indictment charged misrepresentation of the contract and corruption of an official. At the trial the Government laid its emphasis, so far as these petitioners were concerned, on the alleged misrepresentation of the contract.

In his charge to the jury the District Judge, without discussing the facts, and after reading the indictment at length (4 R. 2743 ff.), came to the question of what evi-

* The point here presented was made in the petitions for rehearing in the Circuit Court of Appeals (8 R. 4835, 4853).

dence, short of evidence covering all allegations of the indictment, would suffice to support a conviction. The Judge said (4 R. 2759):

> "The indictment has to charge everything the Government expects to prove, or it would not be permitted to prove them, but at the same time if the Government has tried to prove something and failed to prove it the mere fact that some element or part of the scheme that the Government has alleged in the indictment could not be established beyond a reasonable doubt does not necessarily mean acquittal of all of the defendants. If enough of the claims set out in the indictment are proved beyond a reasonable doubt to amount to a scheme to defraud in the meaning of the mail fraud statute, of the sort and general nature, and substantially the same as that set out in the indictment, a conviction can be had, * * * But you must find beyond a reasonable doubt that the scheme described in the indictment is proved in all its substantial details; that at least some of the misrepresentations must be proved as charged to your satisfaction and beyond a reasonable doubt, and those proved must lay a sufficient foundation for a finding by the jury that the scheme in substance was in fact devised. * * *"

This language permitted the jury to reject as not proved some parts of the scheme alleged and some of the false representations alleged, and yet to return a verdict of guilty if satisfied that the scheme "in substance" existed, the latter phrase being undefined. The charge gave no inkling as to whether any particular thing had to be found as a prerequisite to conviction.

The jury was permitted to convict petitioners either upon a finding that there were misrepresentations with respect to the contract, or that there was a "bribe" or corruption in connection with obtaining it; and it is not possible to determine which of the alternatives the jury in fact found. Now the Circuit Court of Appeals holds that there was insufficient proof of criminal misrepresentation

—the first alternative—to warrant a conviction on that ground alone. But as the jury could have selected either alternative under the charge, it may well have based its verdict on the misrepresentation of the contract. By affirming, rather than resubmitting the case to the jury, the Circuit Court of Appeals has peremptorily *assumed* a jury finding on the second alternative, and has thus substituted itself for the jury.

The reference in the charge to the necessity for finding the scheme "in substance" does not assure that the jury found that these petitioners were criminally implicated in the "bribe"—the finding which the Circuit Court assumes was made. First, no guidance was given to the jury on the extent to which parts of the scheme and some of the misrepresentations could be rejected and the scheme be still found to exist "in substance." Certainly it is a pure guess whether the jury believed the "bribe" was vital to the scheme "in substance." Second, the Circuit Court itself says that the "principal false representation" was as to savings under the contract (8 R. 4806). The jury might have believed the same, and considered that that was the scheme "in substance." Third, the great weight of the proofs as to these petitioners was directed to the alleged distortion of the contract, probably leaving the impression with the jury that that was the scheme "in substance" as to them. (Such an impression was further fostered by another portion of the charge* which invited

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* The court said (4 R. 2755): "If you find from the evidence that the defendants or any two or more of them were with criminal intent parties or partners to the fraudulent scheme charged, then I charge you that it is the law that if anyone a party to the scheme during the existence and execution of the scheme does any act in furtherance of the scheme or in its execution his act becomes the act of all the parties in the criminal enterprise, even though they had no knowledge of what he did; and if it be true that these defendants *or more than one defendant* participated in the scheme as charged in the indictment, *then any representations made by any one of the defendants in furtherance of the scheme would be the act of all the parties.*"

a conviction of all the defendants if these petitioners were found guilty of misrepresentation of the contract and the others were found guilty of the "bribe.")

In practical effect the District Judge was charging that a conviction could be based on factor *A*, or factor *B*, or both. The Circuit Court now holds that factor *B* is indispensable to a conviction. It cannot be inferred (from the charge or from the general tenor of the trial) that the jury found factor *B*. It is thus impossible to say that there was a true jury verdict on the focal issue of criminality. That this error is particularly grievous as to these petitioners in view of the nature and quality of the evidence as to them.

In affirming the conviction upon a theory of the facts not necessarily found by the jury, the Circuit Court ran directly counter to *Nash* v. *United States*, 229 U. S. 373.

The indictment in that case charged a conspiracy to restrain and monopolize trade in certain commodities by twelve different means, each of which was described. The trial court charged the jury in words very similar to those employed by the trial court herein (*sub nom. United States* v. *American Naval Stores Co.*, 172 Fed. 455, 462):

> "It is not necessary for the government to prove that all of the means charged were in fact a part of a single purpose and conspiracy by two or more of the defendants, or that all of the means charged were in fact carried out by two or more of the defendants. It is sufficient if it be reasonably shown beyond a reasonable doubt that *some of those means charged* were a part of the common scheme or design or understanding by two or more of the defendants and that those same means were of themselves sufficient to cause an essential obstruction of the free and untrammeled flow of trade and commerce between the states and with foreign nations."

The Fifth Circuit Court of Appeals affirmed without opinion the convictions obtained on this charge (186 Fed. 489),

and denied rehearing (*id.*). This Court granted certiorari (219 U. S. 587) and reversed the judgment on the ground that some of the means were insufficient to ground a conviction and that under the charge the jury might have rested its verdict upon such means, despite the general language in the charge which required proof of "the common scheme" to restrain commerce. This Court said by Mr. Justice HOLMES (229 U. S., p. 380):

> "Thus while it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all, and permitted a verdict upon any one of them. The 5th, 6th and 8th statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important [*]. Furthermore one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions it showed only cheating, and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance, the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point."

See also *Stromberg* v. *California*, 283 U. S. 359, 368.

As the essence of a jury trial in a criminal case is that the jury must find the essential elements of the crime

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[*] This is an indication of the importance which this Court attached to the point involved. The trial judge had called attention to the abandonment of the 5th, 6th and 8th statements of means (172 Fed., pp. 461, 462) but not "in the connection in which it was important."

(*McAffee* v. *United States*, 105 F. (2d) 21 [App. D. C.]), violation of the rule of the *Nash* case is tantamount to a deprivation of the constitutional right to trial by jury. And as it is the *jury*, not the court, which must find the essential elements of the crime, the *Nash* case necessitates a resubmission to the jury even if the appellate court is of opinion that there was adequate evidence to support a conviction upon a legally tenable theory not necessarily applied by the jury to the facts. *People* v. *Moran*, 246 N. Y. 100, 105.

III. In overruling the claim that these petitioners were denied a fair trial, in a situation which it concedes to have been "extraordinary," the Circuit Court of Appeals so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and it likewise decided Federal questions in a way probably in conflict with applicable decisions of this Court.

We have outlined above and shall not repeat here the factors of prejudice which surrounded the case and entered into the conduct of the trial. The question presented is whether, in a situation described by the Circuit Court as "indeed extraordinary" (8 R. 4808), these petitioners received a fair trial compatible with standards established by this Court.

First, the record should be viewed as a whole, for it is the multiplication and accumulation of prejudicial factors of which these petitioners especially complain. See *Berger* v. *United States*, 295 U. S. 78, 85; *Pierce* v. *United States*, 86 F. (2d) 949 (C. C. A. 6). Thus the over-zealous activities of the prosecutor might be less serious if the atmosphere had not already been charged with bias. The determination to proceed with the trial at a time strategically close to the primary election might be pardonable if the newspapers had been brought to book before the

trial commenced. And so on. There are few cases of actual prejudice which cannot be plausibly argued away by isolating each grievance and citing a convenient decision. The true question is, What was the probable cumulative effect upon the twelve human beings on the jury—an effect of which the jury cannot itself be aware? And the record must be weighed in its entirety before a proper answer can be given. We submit that the Circuit Court could not have rejected petitioners' contentions except by pulverizing the case and failing to consider it as the single drama which it was.

Second, although there is an area of discretion reserved to the trial judge in dealing with claims of prejudice, that area is not unlimited, and no appellate court is justified in canceling its own doubts (candidly expressed by the Circuit Court herein) by simply relying on the probability that the trial judge did tolerably well under trying circumstances. Such an attitude is particularly unjustified where the record is as complete as it is in the case at bar. We submit that the result reached below is due to a disinclination on the part of the Circuit Court to deal with the raw facts which are fully spread on this record. This Court, at any rate, has committed itself to a larger duty in reviewing claims of prejudice. See *New York C. R. Co.* v. *Johnson*, 279 U. S. 310; *Berger* v. *United States*, *supra*.

Third, it is not enough to consider whether the trial as enacted preserved the *minimal* decencies (although we think those also were denied); it is pertinent to inquire whether these petitioners received *as fair a trial as could have been accorded them;* if they did not, we think a *prima facie* case is made out for a new trial. And in this connection the social cost of taking any given step to purge the trial from suspicion of prejudice is to be weighed against the consequences of not taking it. Consider, for example, the Circuit Court's concession that "The trial might very well have been postponed" (8 R. 4808).

Why was it not postponed? The court suggests that "The courts cannot suspend because an election is on and because the cases to be tried may [*sic*] have a political significance" (8 R. 4808). But a continuance of this case (no other case was in question) for six weeks from December 4, 1939, would hardly have amounted to a "suspension" of the courts. The granting of a continuance could not have hurt the legitimate interests of the Government; denial of a continuance certainly created a grave risk of prejudice to the accused. We submit that here, as in other connections, less was done than could easily have been done to eliminate an obvious peril to the fair conduct of the case.

Fourth, the duty of the prosecuting officer is not properly conceived as that of hewing as closely as possible to the line of reversible error in each of his unprovoked sallies on the accused; it is rather the duty of doing affirmatively the most that lies within his power to insure a fair trial. "We think," says the Circuit Court, "that the prosecuting attorney's encouragement of the newspaper publicity about the case was ill-judged, and improper." Again, "The newspapers here sometimes went too far, and the prosecuting attorney ought not to have contributed to what became an abuse" (8 R. 4808). This is to be put by the side of a recent extra-judicial statement of a member of this Court which defines the proper role of the prosecutor: "* * * he who wields the instruments of criminal justice wields the most terrible instruments of government. In order to assure their just and compassionate use, a prosecutor must have an almost priest-like attitude toward his duties."

Fifth, it has already been shown that the claimed prejudice, if it existed, cannot be regarded as harmless at least as to these petitioners, and it has also been observed that these petitioners did not by any act of their own cast themselves into the political arena in which their case was, as we submit, actually tried and decided.

As to the conduct of the court and the prosecutor up to the date of the trial, the standard of duty is indicated in *United States* v. *Sullens,* 36 F. (2d) 230 (S. D. Miss.), where, after the appearance of one severely prejudicial newspaper article circulated in the community, the prosecutor voluntarily moved to quash the *venire* and continue the case, and forthwith lodged an information to punish the editor for contempt (p. 231). In the case at bar, in the course of one of the most heated political campaigns in the history of the State of Louisiana, with "convict parades" the order of the day, the prosecutor saw fit to promote publicity far more hurtful than that in the *Sullens* case, to precipitate the trial when public excitement was at its peak, and to resist the efforts of the accused to secure a reasonable continuance. And the District Court not only remained supine despite the several requests for corrective action but, as we submit, implicitly aggravated the prejudice.

We do not suggest that a court can or should command the press and public processes to stand still simply because there is a case to be tried, nor can the court cease altogether to function in a time of excitement—in a sense this would be a surrender to the mob. But these alternatives, inferentially put forward by the Circuit Court, hardly exhausted the possibilities of corrective action. Measures short of either extreme would have sufficed in the case at bar. They were not taken.

When finally the court was faced with prejudicial abuse of the defendants during the course of the trial, he ordered contempt proceedings—on the theory that the matter had a tendency to prejudice the jury; but he denied motions for a mistrial—on the theory that the matter had not in fact been seen by the jury. When the case is viewed against its whole background of passion, this assumption concerning the hermetical indifference of the jury (which was not locked up) to influences undoubtedly at work on all other members of the community, appears to be no more

than a polite fiction. A more realistic court has said in a similar situation: "It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict." *Meyer* v. *Cadwalader,* 49 Fed. 32, 36 (C. C. Pa.). Accord: *Griffin* v. *United States,* 295 Fed. 437 (C. C. A. 3).

In *Mattox* v. *United States,* 146 U. S. 140, a single prejudicial newspaper article read by the jury was held to void the verdict. Here it is virtually conceded that had either of two newspaper headlines (of the scores of prejudicial ones published) been seen by the jurors, a mistrial should have been ordered, for upon those two stories the newspapers were in fact punished for contempt. It seems to us absurd to imagine that the influences actually at work in the minds of the jurors during the course of the trial were less obnoxious to the conduct of a fair trial than those against which the court fended in the proceedings for contempt.

But if the case stood only on the prosecutor's summation (which the Circuit Court discusses only in vague terms), clearly a question is presented whether reversible error was not committed. The prosecutor's heated statement of personal belief in the guilt of all the accused, with the court emphasizing the fact that it was not an ordinary United States Attorney that held this opinion, but an Assistant Attorney General of the United States, plainly

falls within the strictures of Mr. Justice ROBERTS, dissenting in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 264 (decided after the trial herein):

> "One of the most reprehensible things a prosecutor can do is to attempt to put into evidence before the jury his own, and his colleagues', opinion as to the guilt of the defendants he is prosecuting. Such a practice brings before the jury the unsworn testimony of a sworn officer of the Government. This fact lends it undue and improper weight and injects an element into the case which is so insidious and so impossible to counteract that trial judges, in my experience, have never hesitated to withdraw a juror and declare a mistrial because of this violation of the canons."

We do not understand that the majority of the Court disagreed with Mr. Justice ROBERTS in this portion of his dissent; the majority excused the prejudice by reference to other factors which do not exist herein.

Again, the prosecutor in his summation stated as a fact that these petitioners were implicated in a transaction with which concededly they had nothing to do, and which, had it been proved against them by legal evidence, might well have furnished ground for a verdict of guilty. We refer to the "O'Neil transaction." This hurtful distortion of the evidence, specifically directed to these petitioners, had the effect, whether by design or otherwise, of supplying the very link in the proofs which the Circuit Court has held to be focal to the conviction—the alleged complicity in the "bribe" to Waguespack. This Court has held, in cases less aggravated than that at bar, that distortion of evidence in summation—and particularly by a prosecuting officer—was reversible error. *Waldron* v. *Waldron*, 156 U. S. 361; *New York C. R. Co.* v. *Johnson, supra; Taliaferro* v. *United States*, 47 F. (2d) 699 (C. C. A. 9); *Minker* v. *United States*, 85 F. (2d) 425 (C. C. A. 3); *cf. United States* v. *Socony-Vacuum Oil Co., supra; Turk* v. *United States*, 20 F. (2d) 129 (C. C. A. 8).

IV. In overruling the claim that certain documents, obtained as the result of an unlawful and unconstitutional search and seizure, were improperly received in evidence against these petitioners, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has rendered a decision in conflict with the decision of another Circuit Court of Appeals.

On August 23, 1939—two days after the handing down of an indictment by the Federal Grand Jury against these petitioners, which was subsequently superseded by an indictment adding more counts—the State authorities raided the premises of Newman, Harris & Co. and seized and removed literally hundreds of papers of the firm (see inventory, 4 R. 3014-28). Nineteen documents obtained by means of this raid were offered by the prosecution at the trial herein and were received in evidence over objection (2 R. 1085). Petitioners assigned error to this ruling (8 R. 4666). Examination of the documents will show that they were material to petitioners' conviction (see 8 R. 4666-8).

The sole basis of the search warrant was an affidavit of the District Attorney of New Orleans Parish (Ex. G-26-A, 4 R. 3011-2) sworn to the day after the Federal indictment was handed down. It contained no statement of fact beyond the assertion that a mass of unspecified documents were on the premises of Newman, Harris & Co.

The search warrant, signed the same day by the judge of a local criminal court (Ex. G-26-B, 4 R. 3012-3), simply repeated the language of the affidavit. Nor could the District Attorney suggest any legal basis for the warrant when he testified at the trial herein. He said that "a certain amount of suspicion attached to it [the refunding transaction] which I think justified the District Attorney's office in going into it" (2 R. 1088). He admitted that the warrant was "partly based on suspicion" (*id.*), and mentioned no other basis. As to the purpose of the search,

the District Attorney referred to certain affidavits filed in the State court by two of his assistants, also on August 22, 1939, charging bribery (Exs. G-26-E, F, 5 R. 3029-31), and stated that he had secured the warrant "in order to obtain what I consider to be necessary evidence in connection with the trial of the case" (2 R. 1088). No State trial ever took place.*

That the Federal authorities were closely connected with the unlawful search is manifest from the record, and that they knowingly took the fruits of it is undisputed. The coincidence in dates between the Federal indictment and the State raid is in itself illuminating. Mr. Talbot, attorney for the petitioners below, testified that when he accompanied the State officials back to their office after the raid one of the United States Attorneys was there (2 R. 1103); that gentleman did not remember (2 R. 1099). When asked whether he had not been "exchanging information right along down the line between the United States Attorney's office and your office," the local District Attorney replied that "we had been exchanging information," that he had "been in cooperation on the case" with the Federal prosecutor, and that "in other words, we turned over any records we had to the [Federal] government that the government wanted to inspect" (2 R. 1089). The State officers informed the Federal prosecutor of the results of the search because "we believed the evidence we found would assist them in the preparation of the case today" (2 R. 1098). The seized documents were produced by the State authorities at the trial herein without subpoena (2 R. 1066).

---

* The Circuit Court states that "It does not appear that any action has been taken by Newman & Harris to vacate the search warrant or recover the papers" (8 R. 4811). This is erroneous. A motion was made in the State court to vacate and set aside the warrant, which was pending at the time of the trial herein (2 R. 1090) and has never been decided.

The Circuit Court of Appeals does not declare whether the search was itself unconstitutional under Federal law (the State law is parallel). We submit that it was.

(a) Under applicable decisions of this Court, the dragnet warrant herein was fatally defective for want of particularity.

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."
>
> *Marron* v. *United States*, 275 U. S. 192, 196.

(b) Under applicable decisions of this Court, the warrant was invalid as having issued without "probable cause." Indeed the only affirmance of belief was that the documents were at a certain place, and the search proceeded on the basis of "suspicion."

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury (*Giles* v. *United States* (C. C. A. 1st), 284 Fed. 208; *Wagner* v. *United States* (C. C. A. 8th), 8 F. (2d) 581); and would lead a man of prudence and caution to believe that the offense has been committed."
>
> *Grau* v. *United States*, 287 U. S. 124, 128.

(c) Under applicable decisions of this Court, the warrant was invalid in purpose. The only purpose suggested was to obtain documents for use as evidence of crime of which petitioners were accused or suspected.

> "Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled* v. *United States*, 255 U. S. 298, 310."
>
> *United States* v. *Lefkowitz*, 285 U. S. 452, 464-5.

Assuming *arguendo* that the search was invalid under Federal law, the Circuit Court of Appeals thought that the essential question "turns on whether the federal officers were *party* to the seizure" (8 R. 4810). It then conceded that "there had previously been an *exchange of information* between the two groups of officers and *cooperation* in that way" (8 R. 4811). But it overruled the claim of constitutional right on the ground that "the federal officers had nothing at all to do with the *State's proceedings* for the search" (8 R. 4811). It is, then, the precise holding of the court that the products of an unlawful search by State officials may knowingly be used by the Federal prosecutor in a Federal trial, even though the State and Federal officials have been continuously "cooperating" and "exchanging information" about the very case in connection with which the search is made, provided only the Federal officials do not themselves participate in the State's proceedings for the search. We submit that in so holding the Circuit Court misconstrued the applicable decisions of this Court and took a position at variance with that assumed by the Fourth Circuit Court of Appeals in *Sutherland* v. *United States*, 92 F. (2d) 305.

In *Gambino* v. *United States*, 275 U. S. 310, the Federal officers did not participate in the State's proceedings for the search, yet this Court expressly held that *"Evidence obtained through wrongful search and seizure by state officers who are cooperating with Federal officials must be excluded"* (p. 314). The Court went on to declare the applicable rule as to prohibited cooperation in terms which expose the fallacy of the Circuit Court herein (pp. 316-7):

> "* * * It is true that the troopers were not shown to have acted under the directions of the Federal officials in making the arrest and seizure. But the rights guaranteed by the 4th and 5th Amendments may be invaded as effectively by such co-operation, as by the state officers acting under direction of the Federal officials. Compare *Silverthorn* v. *United States*, 251

U. S. 385, 392. The prosecution thereupon instituted by the Federal authorities was, as conducted, in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States. * * *"

See also, *Byars* v. *United States*, 273 U. S. 28, 34.

Moreover, factitious distinctions which may be suggested between the *Gambino* case and the instant case have been rejected by the Fourth Circuit Court of Appeals in *Sutherland* v. *United States, supra.* It is true that in the *Gambino* case the search was made "solely for the purpose of aiding the United States in the enforcement of its laws" (275 U. S., p. 317), while here the search might conceivably also have aided the State in the enforcement of its laws. But this, in the view of the Fourth Circuit, is immaterial. Again, attempted distinction on the ground of difference of *degree* of cooperation between State and Federal officers is blasted by a consideration of the facts before the Fourth Circuit, which certainly revealed no greater degree of cooperation than in the instant case.* The court said in the *Sutherland* case (92 F. [2d], pp. 307-8):

"* * * But we think that, where the state and federal officers have an understanding that the latter may prosecute in the federal courts offenses which the former discover in the course of their operations, and

* The Stipulation of Facts in the *Sutherland* case recites that "there were no federal officers present or participating in the search"; that after the search, the State "officers participating in the search discussed among themselves the advisability of turning the case over to the federal authorities"; that the Federal officer who utilized the fruits of the search "did not know of the search until the State officers consulted him with reference to adopting the case, and that he had not suggested or instigated the search"; and that "the State officers generally understood that when they have made a seizure of illicit liquor they are at liberty to consult with the federal officers with a view to determining whether or not the federal officers adopt the case and institute a federal prosecution against the particular offender; that they frequently do pursue this course and that frequently such cases are adopted" (Record on Appeal, pp. 7, 8).

where the federal officers adopt a prosecution originated by state officers as the result of a search made by them, the same rule as to the admissibility of evidence obtained in the course of the search should be applied as if it were made by the federal officers themselves or under their direction. Gambino *v.* United States, 275 U. S. 310, * * *. It is true that in the Gambino Case it is stated that the 'wrongful arrest, search, and seizure were made solely on behalf of the United States'; but we do not think that this is sufficient to distinguish that case from this, where there was general co-operation between state and federal officers and where the federal officers in fact adopted the prosecution which the state officers had begun as a result of their search. It is the fact that there was such co-operation and adoption and not the fact that the search was made solely in behalf of the United States which in our opinion is the determining factor; for, whether the arrest, search, and seizure be made solely on behalf of the United States or not, it remains true that 'the rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such co-operation as by the state officers acting under direction of the federal officials.' "

If, as we contend, the present case is governed by the *Gambino* case, the court below ran counter to applicable decisions of this Court; in any event the decision below conflicts with the *Sutherland* case, creating a division of the Circuits on a question that is important and worthy of review.

Conclusion

For the foregoing reasons, your petitioners, by their solicitors, respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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14-706 (17a)

APR 10 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 911.

NORVIN T. HARRIS, JR.,
Petitioner,

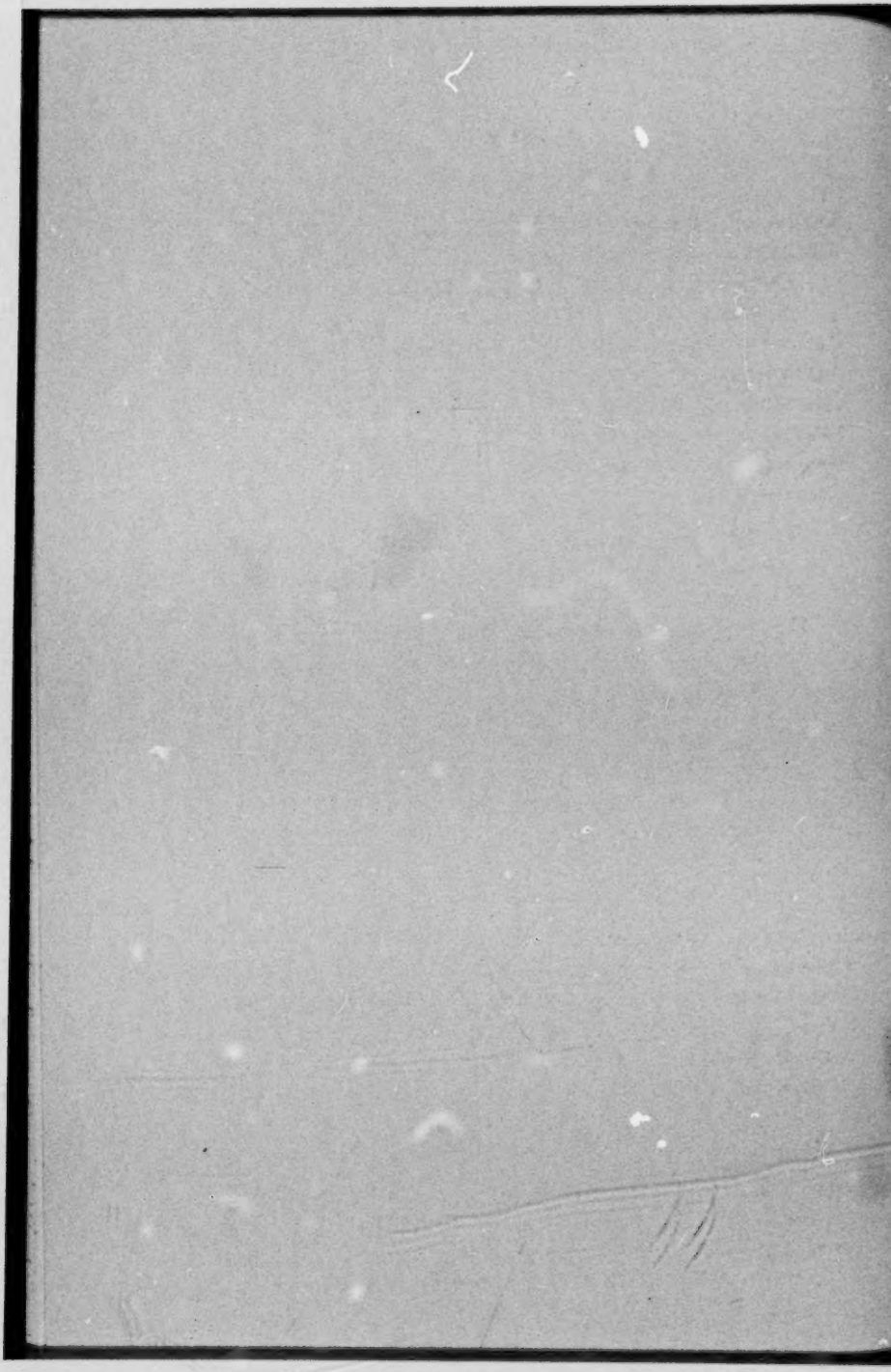
vs.

UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL AND SUPPLEMENTAL PETITION OF NORVIN T. HARRIS, JR., FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND NOTICE OF MOTION FOR LEAVE TO FILE.

DAVID V. CAHILL,
Solicitor for Petitioner.

SUPREME PRINTING COMPANY, LAW PRINTERS, BARCLAY 7-0349



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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 911.

NORVIN T. HARRIS, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Notice of Motion.

TO THE HONORABLE FRANCIS BIDDLE, SOLICITOR GENERAL OF THE UNITED STATES, FOR THE RESPONDENT:

PLEASE TAKE NOTICE that on the 14th day of April, 1941, at the opening of court on that day a motion for permission to file an additional and supplemental petition for a Writ of Certiorari herein will be submitted for consideration.

Dated, New York, N. Y., April 9th, 1941.

Yours, etc.,

DAVID V. CAHILL,
Solicitor for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 911.

NORVIN T. HARRIS, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals entered January 18, 1941 in which rehearing was denied March 3, 1941 (Rec. Vol. I, pp. 4823, 4860). The said judgment affirmed the judgment of the District Court for the Eastern District of Louisiana entered on January 2, 1940, in which defendants were convicted and sentenced for alleged uses of the mails in furtherance of a scheme to defraud.

Within the time prescribed for the filing of petitions for writs of certiorari petitioners filed petitions which are pending in this Court, but have not been decided and

it is believed that they have not been submitted to the Court for decision. Leave is now asked on behalf of petitioner, NORVIN T. HARRIS, JR., to file this additional and supplemental petition, presenting in more concise form the reasons for granting the writ and arguments therefor, and additional grounds and arguments not specifically contained in the prior petition. An application is being made simultaneously with the presentation of this petition for its consideration.

Opinions Below.

There was no opinion in the District Court for the Eastern District of Louisiana. The opinion of the Circuit Court of Appeals is reported in 117 Fed. (2nd) 110 (R. Vol. I, p. 4801).

Jurisdiction.

The jurisdiction of this court is invoked under Section 24a of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.).

Questions Presented.

1—Is this type of case within the Mail Fraud Statute and the jurisdiction of the Federal Court?

2—Were the uses of the mails in furtherance of a scheme to defraud?

The questions presented in the original petition are not abandoned, but on the contrary are earnestly urged upon the Court's attention, in addition to those presented here.

Statute Involved.

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C. A. Title 18, Section 338) are as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both. (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Section 215, 35 Stat. 1130.)"

Statement.

A sufficient statement of the facts has been submitted in the petition filed heretofore.

Reasons for Granting Writ.

1—The fraud alleged, as found by the Circuit Court of Appeals, is essentially the bribery of a State official. There is no decision of this Court, or any other Federal court, holding that such an offense constitutes fraud. There are decisions in other Circuits than the Fifth Circuit, which in logical effect conflict with the decision here. The effect of this decision requires a settlement of the law as to the scope of the Statute.

2—The uses of the mails alleged were not in furtherance of any scheme to defraud as heretofore defined and were mainly to conceal an alleged bribery. There is a conflict of authorities on the question whether such uses of the mails as the Government attempted to prove are within the Statute.

ARGUMENT.

I.

This type of case is not within the mail fraud statute or the jurisdiction of the Federal courts.

What has been stated as to the essence of the accusation and proof in the original petition need not be repeated here. A brief reference to the opinion of the Circuit Court of Appeals in its decision affirming the judgment of conviction will suffice for present purposes:

> "Under all the testimony the settlements thus figured seem to us so exorbitant and unreasonable as to indicate fraud or mistake in a civil procedure. Yet we should hesitate to rest a criminal conviction for fraud on it alone" (R. Vol. 8, pp. 4821-4822).

The scheme alleged was to obtain money by false representations. The sole "false representation", which the Government attempted to prove was the representation as to the savings effected for the Levee Board and the consequent calculation as to the fees due petitioners. The elimination of that leaves no false representation in this cause. It becomes purely a question of petitioners' privity to the bribery of a State official. Assuming solely for the sake of this argument a fact, of which there is no evidence, that petitioners knew of and participated in the payment to Waguespack, the sole question presented with respect to the nature of the case is this:

Is a scheme to bribe a State official in connection with his official duty, a scheme to defraud under Section 215?

The cases cited by the Circuit Court of Appeals (R. 4806-4807) in support of its conclusion that such a scheme to bribe is a scheme to defraud, with one exception deal only with the "essential immorality" of a bribery, which for our purpose may be conceded. They hold that contracts obtained by bribery of Federal officials or private fiduciaries are not enforceable by civil suit or that such officers or fiduciaries are liable to account for profits obtained by bribery.

> *Oscanyan* v. *Winchestir Arms Co.*, 103 U. S. 261;
> *Crawford* vs. *United States*, 212 U. S. 183;
> *United States* v. *Carter*, 217 U. S. 286;
> *Pan American Petroleum Co.* v. *United States*, 273 U. S. 456, 500.

The sole exception is the *Crawford* case, which was based not on the mail fraud statute but on Section 5440 Revised Statutes, later Section 37 United States Criminal Code and now Section 88 U. S. C. In that case it was held that an agreement by an official of the United States to receive secretly a portion of the amount paid by the

United States for certain goods on his order was an agreement to defraud the United States under Section 5440.

There is nothing in the decision which suggests any thought that a scheme to bribe a State official is within the Federal jurisdiction under the mail fraud statute. It will be noted that the conspiracy was to defraud the United States. Of the Federal Courts' jurisdiction in such a case there could be no question. It did not involve anything within a state's domain. The whole wide range of "essenial immorality" is not brought within the scope of the statute now under consideration. The purpose of the statute is to prevent schemes of deception from being facilitated by the use of the mails. As one of our circuits has defined such a scheme, it is "a cheat by means of lies" *Bentel* v. *United States,* 13 Fed. (2nd) 327, 329.

It was decided by this Court that not every scheme calculated to injure another or to deprive him of his property wrongfully is within Section 215.

Fasulo v. *United States,* 272 U. S. 620.

In that case this Court held specifically that extortion is not a fraud within this statute.

Norton v. *United States,* 92 Fed. (2nd) 753.

Likewise embezzlement is outside its purview.

United States vs. *Smith,* 29 Fed. (2nd) 926.

In the latter case Judge Woodrough now Circuit Judge of the Eighth Circuit, makes some interesting observations, which are pertinent here, to the effect that an indictment alleging fraud, bases on embezzlement, is a subterfuge to avoid the limitations set by the mail fraud

statute on Federal jurisdiction, and to encroach upon and override the lawful authority of the state. He added (p. 929): "As the great array of mail fraud prosecutions that have been sustained in the federal courts are reviewed, it will be found in every case that there was a definite scheme and letters to execute a scheme, clearly distinguishable from a crime committed and letters to hide and cover it up."

In the case at bar some of the letters were used to advertise and facilitate the refinancing, which in itself was legitimate and free from any taint of fraud. Of the others the utmost that has been said or could be said by the prosecutors is that they may have been used to conceal the alleged bribery. Therefore, we come back to the same question whether bribery of a state official and use of the mails in connection with the bribery are within the Federal jurisdiction under the statute. Undoubtedly hundreds of prosecutions under it are instituted yearly. In so far as this type of case is concerned the question as to the applicability of the statute has never been answered. The Fifth Circuit by its decision here is in conflict with the logic of decisions in other circuits. Only the exercise of this Court's supervisory jurisdiction can resolve the conflict, the doubt as to the bounds of the mail fraud statute, and the resulting confusion.

II.

The uses of the mails were not and could not have been in furtherance of the alleged scheme to defraud.

This subject has already been introduced above in the discussion of the first point, and the proposition follows almost as a corollary from that point.

Most of the letters mailed, specifically those alleged in counts 1, 3, 6, 7 and 8, were to and from petitioners' bankers. The letter mentioned in count 2 is a registered return receipt for the letter of count 1. With respect to these uses of the mails the position of the prosecutors, as stated in their summation, was that the checks were mailed to conceal the bribery (R. Vol. IV, pp. 2573, 2579 and 2580). Unless bribery is fraud, these could not have been uses of the mails in furtherance of a scheme to defraud, and it was error to submit these counts to the jury.

Petitioners were found not guilty on count 4.

The fifth count rested on the mailing of a newspaper notice of bonds that had been called for payment under the refunding plan. The refunding was indisputably honest, legitimate and free from any taint of fraud. The Circuit Court of Appeals finds that the transaction, in so far as the refunding was concerned, was accomplished "with skill and success" * * * "Any fraud about it must lie in the obtaining of the contract or in the settlement under it" (R. Vol VIII, p. 4817). The newspaper notice, therefore, was not in furtherance of the fraud.

Not every letter relating to some phase of the general transaction can be held by reason of that fact alone to be in furtherance of the scheme to defraud.

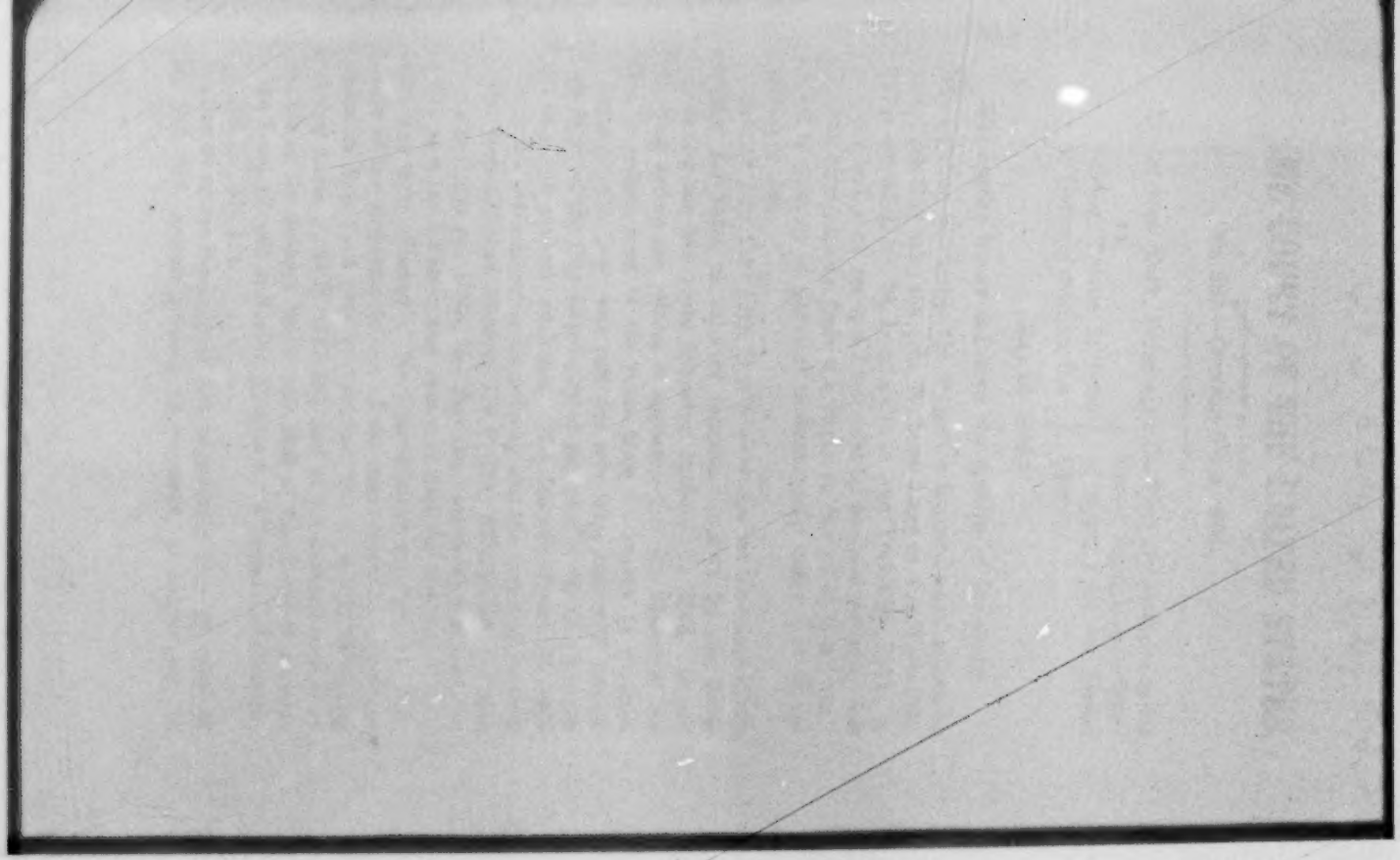
With respect to the other uses of the mails alleged the language of Judge Woodrough in *United States* v. *Smith, supra,* is pointedly applicable.

Conclusion.

It is urged that in addition to the grounds set forth in the original petition the questions presented here and the reasons shown for granting the writ require the exercise of this Court's supervisory jurisdiction. The statute involved is one of great importance and wide application. In the interest of all concerned in these cases, including of course the Government, the scope of the statute should be authoritatively decided and the limits of Federal jurisdiction clarified.

Respectfully submitted,

DAVID V. CAHILL,
Solicitor for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 912

HENRY J. MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WARREN O. COLEMAN,
EDWARD R. SCHOWALTER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 912

HENRY J. MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Henry J. Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the aforesaid entitled cause on January 18, 1941, affirming the judgment of conviction of petitioner, in the United States District Court for the Eastern District of Louisiana.

Summary.

Petitioner was indicted and convicted of the crime of using the mails in furtherance of a scheme to defraud, in violation of Sec. 215 of the Criminal Code, Title 18, U. S. C. Sec. 338.

He was tried and convicted with four other defendants.[1] In the court below each defendant was represented by separate counsel, prosecuted separate appeals and filed separate briefs.

They are each making separate applications for writs of certiorari.

The basis of the prosecution was a certain contract entered into by the Board of Commissioners of the Orleans Levee District with Newman & Harris Co., a well known bond brokerage house of New Orleans, for the purpose of refunding the outstanding bond issues of the Board. Newman & Harris Co. was to be paid a percentage of the amounts saved the Board. The basis of the fraud claimed by the Government was that the computations of the amount due Newman & Harris was figured on an incorrect theory, and that Mr. Waguespack, who was a member of the Board participated in the profits of the refunding operation and concealed this fact from the other Board members which concealment and incorrect computation constituted bribery and a scheme and artifice to defraud (R. V. I., p. 110).

As to the computations the Court of Appeals stated that they might indicate fraud or mistake in a civil proceeding, but they would hesitate to rest a criminal conviction for the bribery of the board member. See (Op. p. 121—R. pp. 4821-2).

Reasons for Granting the Writ.

1. That the decision of the Court of Appeals is in conflict with applicable decisions of this Court, and decisions of other Circuit Courts of Appeal on the same matter, in that the court refused to charge the jury that advice of a reputable attorney honestly acted upon would constitute

[1] Abraham L. Shushan, Robert J. Newman, Norvin T. Harris, Jr., and Herbert W. Waguespack.

a defense in a case involving a specific intent, to-wit, intent to defraud, and on the question of good faith qualified the charge by instructing the jury, as follows:

> "On this question of good faith, you are instructed that it is no defense to a wrongful act knowingly and intentionally committed that the intent was innocent" (R. IV. 2756).

2. The Court of Appeals has decided an important question of general law, which extends the matters embraced within the terms of the mail fraud statute further than it has ever been extended during its existence of more than sixty-eight years, and in conflict with the weight of authority by holding that, "a scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official, would not only be a plan to commit the crime of bribery, but would be a scheme to defraud the public," without requiring the court to define the legal meaning of the term "bribery" in its instructions to the jury, or to give the special charges presented by petitioner explaining that a corrupt intent to influence the action of the public official was essential to the offense of bribery which was an essential element in this mail fraud indictment; and that if petitioner paid the attorney-board-member, believing it legal to do so, it was not bribery.

3. The Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court, to-wit: Does the mail fraud statute embrace cases where money or property is obtained dishonestly by means of bribery, when no lies or false pretenses, promises or representations are made?

4. The proceedings in the District Court have so far departed from the accepted and usual course of judicial proceedings, and the lower courts have so far sanctioned such

a departure as to deprive the defendants of due process of law, and a fair and impartial trial, as to call for an exercise of this court's power of supervision by reason of the misconduct of the prosecuting attorney as was found by the Court of Appeals (see Op. pp. 115-116, reported decision, R. 4807-4809), wherein the Court of Appeals found the misconduct which amounted to an abuse, but failed to afford petitioner any relief.

5. The other four defendants, included in the indictment, are filing separate petitions for certiorari herewith,[2] and since the issues, in addition to the aforesaid, are precisely the same as in this case, in the interest of brevity, we respectfully refer the court to the petitions filed in said cases for the additional reasons for granting the writs here, which said reasons are adopted and made part hereof by reference, as fully as if copied herein in extenso.

Further reference is made to the record filed in said cases which record is precisely the same record used in the court below; petitioner files said record by reference thereto as it is voluminous and the available copies are in the possession of the other defendants and petitioner is without funds sufficient to have additional copies printed.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9388, *Abraham L. Shushan, et als.* v. *United States of America,* and that said judgment of the United States District Court for

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[2] *Abraham L. Shushan* v. *U. S.*, No. 910; *Robert J. Newman* v. *U. S.*, No. 911; *Norvin T. Harris* v. *U. S.*, No 911; *Herbert W Waguespack* v. *U. S.*, No. 913; all October 1940 Term.

the Eastern District of Louisiana, affirmed by the said Court of appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Petitioner further prays that he may file this petition by making reference to the record in the cases of the other defendants (see p. 3 n. 2) and without duplicating the printed copies of said record which are on file in this Court.

HENRY J. MILLER,
Petitioner,
By: WARREN O. COLEMAN,
EDWARD R. SCHOWALTER,
Counsel for Petitioner, 1329 Whitney Building,
New Orleans, Louisiana.

BRIEF IN SUPPORT.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 4801) is reported in 117 F. (2d) 110.

Jurisdiction.

The judgment of the Circuit Court of Appeals, affirming the conviction of the respondent, was entered January 18, 1941 (R. 4823), petitioner's application for a rehearing was denied on March 3, 1941 (R. 4860). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934,

Statute Involved.

Criminal Code Sec. 215, 18 U. S. C. Sec. 338, (R. S. Sec. 5480; Mar 2, 1889, C. 393, Sec. 1, 25 Stat.; 873; Mar 4, 1909, C. 321, Sec. 215, 35 Stat. 1130), reads in part as follows.

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter * * * shall be fined not more than $1000 or imprisoned not more than five years, or both."

Statement of Case.

The statement of case has been given in the petition, and in the interest of brevity, such statement is not repeated at this point.

Specification of Errors.

1. The Court below erred in refusing to charge the jury that advice of reputable counsel honestly accepted and acted upon was a defense in a mail fraud case, and charging in lieu thereof that innocent intent was no defense.

2. The Court below erred in holding that a scheme to bribe a public official, was a scheme to defraud within the meaning of the mail fraud statute, and at the same time refusing to instruct the jury as to the meaning of the legal term "bribery", or to inform the jury that a corrupt intent to influence the official action of the public official was an essential ingredient of the mail fraud statute.

3. The Court below erred in holding that the mail fraud statute embraced cases where money or property is obtained dishonestly by means of bribing a public official, when no lies or false pretenses, promises or representations are made.

4. The Court below erred in sanctioning the misconduct of the prosecuting attorney; thus depriving the defendants of a fair and impartial trial, and due process of law.

ARGUMENT.

Specification of Error No. 1.

Defense Based on Advice of Counsel—Innocent Intent.

The basis of the application for this writ under this heading is the failure of the Court of Appeals to follow the decision of this Court approving a charge on the subject of advice of counsel as a defense in a case involving a specific criminal intent.[3] In fact the Court of Appeals completely ignored the case although it was emphasized for their attention in both original brief, and on application for rehearing. The charge requested in this case was modeled

from the *Williamson* [3] case, although the Court of Appeals has refused to even mention it in its opinion. The charge given in the *Williamson* case [3] reads in part as follows:

> "* * * if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do * * * and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves wilful and unlawful intent; even if such advice were an inaccurate construction of the law."

That charge is in line with the decisions of other Circuit Courts of Appeal,[4] and of the state courts and law writers.[5]

At the trial, petitioner admitted all of the facts in the case; his only defense was innocent intent based on the contention that he employed the lawyer on a contingent basis to represent him in the bond transaction; the lawyer although a member of the Board without pay, had represented petitioner for many years. The government contended that the payment of this fee to this lawyer-member of the Board was bribery. Petitioner then proffered the following special charge;

> "A person has a legal right to act and rely upon the advice of a reputable attorney, if he received, acts and relies upon the advice in good faith. If you find that Miller's actions in this case were based upon his honest belief in the correctness of his attorney's advice, he would not be guilty because of any act based upon his

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[3] *Williamson* v. *U. S.*, 207 U. S. 425, 453.

[4] *U. S.* v. *Conner*, Fed. Cases No. 14,847; *U. S.* v. *Stanley*, Fed. Cases No. 16376; *U. S.* v. *Homestake Min. Co*, 117 Fed. 481; *Miller* v. *U. S.*, 277 Fed. 721; *Hersh* v. *U. S.*, 68 F. (2d) 799; *Levinson* v. *U. S.*, 263 Fed. 257; *Townsend* v. *U. S.*, 95 F. (2d) 352; *Murdock* v. *U. S.*, 62 F. (2d) 926; *Hays* v. *Stine*, 289 Fed. 224; *Lindsey* v. *Testa*, 200 Fed. 124.

[5] *People* v. *Powell*, 63 N. Y. R. 91; 22 C. J. S. verbo Criminal Law, Sec. 48.

> reliance in good faith upon that advice, even if such advice subsequently proved to be erroneous" (R. 2767).

Not only did the trial judge refuse this charge, but ignored petitioner's only theory of defense; refused to charge on the subject at all, and instead give the following grossly erroneous and prejudicial instruction to the jury;

> "You are instructed that it is no defense to a wrongful act knowingly and intentionally committed that the intent was innocent" (R. IV. 2756).

This is in direct conflict with the holding of this Court,[6] as well as the holdings of all of the Circuit Courts of Appeals[7] that innocent intent is a bar to conviction. So hopelessly incorrect and prejudicial was the qualification of the court's first statement that good faith was a defense as against the later modification that innocent intent was not a defense, that the Court of Appeals made no attempt to justify it, but merely left it out of the opinion as though the point was not in the case, although this petitioner laid great stress upon it. He argued that he had a legal defense, but was foreclosed in that defense by the court's failure to properly instruct the jury—thus depriving him of any jury trial on the only defense issue raised by him. If the jury believed that it was wrong for him to pay the board member a fee, they were constrained to convict him even though they believed that he did not intend to defraud, because they had been instructed that if he committed a wrongful act it was no defense that his intent was innocent.[8]

[6] *Durland* v. *U. S.*, 161 U. S. 306.

[7] *Rudd* v. *U. S.*, 173 Fed. 912; *Gold* v. *U. S.*, 36 F. (2d) 32; *Sandals* v. *U. S.*, 213 Fed. 575; *Harrison* v. *U. S*, 200 Fed 662; and authorities cited therein.

[8] Bishop on Criminal Law, 9th Ed. Sec. 85; 11 C. J. S., Sec. 2, Par. 2, p. 844; *People* v. *Sheffield, et als.*, 108 Cal. App. 721; *People* v. *Werner*, 84 Pac. (2d) 168; *York* v. *State*, 42 Ga. App. 453; *State* v. *Beattie*, 129 Me. 229; *Scott* v. *State*, 107 Ohio St. 475; *Allen* v. *State*, 72 Pac. (2d) 516 (Okla.); *State* v. *Hart*, 136 Wash. 278; *White* v. *State*, 103 Ala. 72; Bishop on Criminal Law, 9th. Ed., Sections 297 and 300.

Specification of Error No. 2.

Court's Failure To Instruct Jury Relative To Meaning of Term "Bribery".

The Court of Appeals held that in this case the statutory offense of bribery was an essential element of this mail fraud indictment. Bribery was charged in the indictment. The court read the indictment to the jury, but refused to give any charge that would enlighten the jury as to the legal meaning of the term "bribery".

Petitioner presented a charge on the subject, as follows:

> "I charge you, Gentlemen of the Jury, that you are not to infer from the fact that Mr. Miller paid part of his profits to Mr. Waguespack that he had an intent to bribe Mr. Waguespack if you find from the evidence that Mr. Miller believed that such a payment to Mr. Waguespack was lawful" (R. IV, 2768).

This was refused. The Court of Appeals has found that the crux of the case was the plan to bribe a public official, which was tantamount to a scheme to defraud, but the jury was never enlightened as to what bribery means in law; they were never told that the payment of money to a public official was not bribery unless accompanied by a corrupt intent. If a person charged directly with bribery is entitled to have the term "bribery" defined and the essential elements, including the element of corrupt intent, clearly explained to the jury by proper instructions, a fortiori is it necessary when bribery is made an element in a complicated mail fraud indictment, and the defendant seasonably presents special charges on an important theory of his case so that the jury may understand that theory and the essential rules of law applicable thereto.[9]

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[9] Zoline's Fed. Criminal Procedure, Vol. 1, Sec. 440 citing *Hendrey* v. *U. S.*, 233 Fed. 5; *Patterson* v. *U. S.*, 222 Fed. 599.

Here again the Court of Appeals merely left this important point out of its decision as though it was not raised, and refused to pass on the question.

Specification of Error No. 3.

All Dishonest Methods of Obtaining Property Not Embraced In Mail Fraud Statute.

The holding of the Court of Appeals that the dishonest method of obtaining an advantage by bribing a public official, where no lies are told, and where there are no false or fraudulent promises, pretenses or representations appears to extend the statute to the verge, and appears to petitioner to be in conflict with decisions of this Court,[9a] wherein this Court rejected the argument that the mail fraud statute embraced all dishonest methods of obtaining property. Congress has not said that the deprivation of persons of property by means of bribery shall constitute a violation of the mail fraud statute, and as criminal statutes must be strictly construed, and as this Court has said,[10]

> "* * * it is not for the courts, in the absence of such legislation to attempt to supply it by stretching old statutes to new uses, to which they are not adapted and for which they were not intended. * * *"

Specification of Error No. 4.

Misconduct of Prosecuting Attorney Depriving Petitioner of Fair Trial and Due Process of Law.

This court in reversing a conviction because of the misconduct of the prosecuting attorney said [11] in speaking of the prosecuting attorney that;

> "But while he may strike hard blows, he may not strike foul ones. It is as much his duty to refrain from

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[9a] *Fasulo* v. *U. S.*, 272 U. S. 624.
[10] *U. S.* v. *Gradwell*, 243 U. S. 383.
[11] *Berger* v. *U. S.*, 295 U. S. 78.

> improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. * * * improper suggestions, insinuations and, especially, asertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

This case is a much more aggravated one than the *Berger* case for not only did the prosecuting attorney express his personal belief in the guilt of petitioner (R. V. 8, p. 4703) and when objection was made the judge told the jury that the attorneys should not inject their personal views in the case because it was not evidence he stated that,

> "The government is prosecuting the case, and the Assistant Attorney-General is before you. You may draw your own inference from that * * *" (R. V. 8, p. 4703).

Meaning, of course, that the jury could infer that the Assistant Attorney-General believes petitioner was guilty or the Government would not be prosecuting the case, nor would the Assistant Attorney-General be before the jury if he did not believe petitioner was guilty. That which could not have been done directly was done indirectly. Many other instances of prejudicial, inflammatory and improper arguments were made.

But the prejudice extends further and we need only quote from the opinion of the Court of Appeals to point it out (Op. p. 116, R. 4808).

> "We have merely sketched what was indeed an *extraordinary situation.* * * * We think that the prosecuting attorney's encouragement of the newspaper publicity about the case *was ill-judged, and improper.* * * * The newspapers here sometimes went too far, and the *prosecuting attorney* ought not to have *contributed to* what became an *abuse.*" (Italics supplied.)

Other defendants will elaborate on this point, and in the interest of brevity we will content ourselves with pointing it out, as we believe this to be a case which should be scrutinized by this Court in view of the conduct of the prosecuting attorney who kept up a constant campaign of statements to the press relative to this case in the midst of one of the bitterest political campaigns in the history of the State, and this case was an important issue in the campaign.

The defendants did everything they could to try to protect their rights. They filed several petitions prior to the trial to punish the newspapers; they requested a continuance until the inflamed public atmosphere cleared after the election, but the District Judge refused to grant petitioner any relief.

The case is, therefore, immeasurably more aggravated than the *Berger* case, *supra,* because the prosecuting attorney in this case began his misconduct months before the trial by contributing to the newspaper's inflammatory campaign against the defendants; coerced the prospective jurors by making public statements relative to an investigation by the grand jury of jury fixing in connection with a trial of one of the defendants in this case, and in general stirred up a condition of prejudice in the minds of the public against them for the purpose of setting a proper atmosphere for the trial of petitioner.

The 6th Amendment of the Constitution of the United States provides that,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *."

The 5th Amendment provides, that the defendants shall not

> "* * * be deprived of life, liberty or property, without due process of law."

Petitioner has not received such a trial as was contemplated by the 6th Amendment, nor has he received due process within the meaning of the 5th Amendment.

Conclusion.

We respectfully submit that this petition for a writ of certiorari should be granted.

WARREN O. COLEMAN,
EDWARD R. SCHOWALTER,
Counsel for Petitioner.